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CASES
ON
NEGOTIABLE INSTRUMENTS

SUPPLEMENTARY TO
AMES'S CASES ON BILLS AND NOTES

BY
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LANGDELL HALL, CAMBRIDGE
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PREFATORY NOTE

THE enactment of the Negotiable Instruments Law and the course of judicial decision have made desirable a collection of recent cases for use as a supplement to Ames's Cases on Bills and Notes. Eventually the editor and Professor Joseph D. Brannan expect to publish a new case-book on the subject. Professor Brannan has very kindly allowed the use of his material in the preparation of this pamphlet.

The names and arguments of counsel have not been reprinted. Other omissions from the reported text are indicated. Citations of the local negotiable instruments statute have been omitted, and references to the section-numbering of the Uniform Negotiable Instruments Laws substituted in brackets. The annotations have not attempted to include any full list of authorities, but merely to indicate a few articles or significant decisions which may help in the discussion of the cases selected.

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JUN 4 1919

CONTENTS

	PAGE
FORMAL REQUISITES	1
INDORSEMENT	6
MODE OF TRANSFER	16
PURCHASE FOR VALUE WITHOUT NOTICE	25
OVERDUE OR DISHONORED PAPER	73
EXTINGUISHMENT	80
NEGOTIABLE BONDS	93

APPENDIX

FORMS	101
LIST OF CASES FOR STUDY	104

TABLE OF CASES

	PAGE
Anonymous	6
Chappelear *v.* Martin	18
Columbian Banking Co. *v.* Bowen	77
Crocker National Bank *v.* Byrne	96
Dunn *v.* Meserve	88
Edelstein *v.* Schuler & Co.	93
Empire Trust Co. *v.* Manhattan Co.	51
Eskridge *v.* Thomas	25
Fairbanks *v.* Snow	28
Gardner *v.* Beacon Trust Co.	73
Guaranty Trust Co. *v.* Hannay & Co.	33
Haddock, Blanchard & Co. *v.* Haddock	6
Harvey *v.* Towers	10
Holliday State Bank *v.* Hoffman	2
Hood *v.* Stewart	16
Jordan Marsh Co. *v.* National Shawmut Bank	40
Leavitt *v.* Thurston	13
Lill *v.* Gleason	80
Merchants National Bank *v.* Santa Maria Sugar Co.	67
Murray *v.* Thompson	31
Nash *v.* De Freville	83
Parsons *v.* Utica Cement Mfg. Co.	20
Phillips *v.* Mercantile National Bank	45
Robb *v.* Pennsylvania Co. for Insurance, etc.	62
Scholfield *v.* Earl of Londesborough	57
Sloan *v.* McCarty	1
Smith *v.* Bayer	70
Tolman *v.* American National Bank	48
Union Trust Co. *v.* McGinty	89

CASES ON NEGOTIABLE INSTRUMENTS

FORMAL REQUISITES

SLOAN *v.* McCARTY.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1883.

134 Mass. 245.

CONTRACT upon the following instrument, signed by the defendant, and witnessed: "$85.00. Rutland, April 5th, 1874. Received of T. S. Sloan, this day, roan horse known as A. M. Brown horse for which I promise to pay T. S. Sloan or order eighty-five dollars one month from date, at the Leicester ——, said horse to be and remain the entire and absolute property of the said Sloan until paid for in full by me." Writ dated July 15, 1881. The answer set up, among other defences, the statute of limitations. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, upon agreed facts. . . .

FIELD, J. The contract declared on contains a promise to pay to the plaintiff or order a certain sum of money in one month from date for a horse received of the plaintiff; if this were all, it would be a promissory note, as the recital of the consideration does not affect the character of the contract. But the contract also contains an agreement that the horse shall remain the property of the plaintiff until paid for in full by the defendant. This is not an agreement relating to the manner in which the promise to pay money may be enforced, but is a substantive agreement. The whole contract describes a conditional sale of a horse. If the money were not paid by the defendant at the time specified, the plaintiff could, if he chose, rescind the conditional sale, and the defendant then would have no right to the horse, and would no longer be liable to pay the note. If the plaintiff should insist upon the performance of his promise by the defendant, the obligation of the defendant to pay the money is in legal effect conditional upon the title to the horse vesting in him when the money is paid in full, and this condition appears on the face of the contract.

The contract contemplates that the payment of the money by the defendant and the transfer of the title to the horse from the plaintiff should be simultaneous acts; and if the horse should die, for example, within the month, without fault on the part of the

defendant, the plaintiff would be disabled from transferring the title, and could not maintain an action on the contract. Swallow *v.* Emery, 111 Mass. 355. The contract is something more than a promise to pay money, and the promise to pay money is not a promise to pay it absolutely and at all events; and therefore the contract is not a promissory note within the meaning of the Gen. Sts. *c.* 155, § 4, on which, if signed in the presence of an attesting witness, an action could be brought, under § 7, at any time within twenty years after the cause of action accrued. Hartley *v.* Wilkinson, 4 Camp. 127. Cook *v.* Satterlee, 6 Cow. 108.

As the action was not brought within six years after the cause of action accrued, the entry must be,

Judgment for the defendant.

HOLLIDAY STATE BANK *v.* HOFFMAN.

SUPREME COURT, KANSAS. 1911.

85 Kan. 71.

THE opinion of the court was delivered by

PORTER, J.: The bank brought this action on a promissory note given by C. B. Hoffman to the Merchants' Refrigerating Company for shares of its capital stock. Hoffman admitted the execution of the note and alleged a total failure of consideration. On the trial he introduced evidence tending to show that the stock for which the note was given was valueless and that he was induced to purchase the same by the false and fraudulent representations of J. E. Brady, president of, and acting for, the refrigerating company. The plaintiff introduced evidence tending to show that it purchased the note in due course without notice of defenses. At the close of the evidence the court directed a verdict for the plaintiff for the amount of the note with interest. The defendant appeals.

The case turns upon the question whether the note is negotiable. It reads as follows:

"$4500. No. ——.

KANSAS CITY, Mo., Sept. 18, 190—.

"Due ——. Six months after date, for value received I promise to pay to the order of Merchants' Refrigerating Company, Kansas City, Mo., forty-five hundred and $^{no}/_{100}$ dollars at the office of the Merchants' Refrigerating Company, Kansas City, Mo., with interest from maturity until paid at the rate of six per cent per annum. To secure the payment of this note and of any and all other indebtedness which I now owe to the holder hereof, or may owe him at any time before the payment of this note I have hereto attached, as collateral security, the following: Stock certificate No. 137 of the capital stock of the Merchants' Refrigerating Company, calling for 50 shares of the stock; par value $5000.

"The above collateral has a market value of $6250.

"If, in the judgment of the holder of this note, said collateral depreciates in value, the undersigned agrees to deliver when demanded additional security to the satisfaction of said holder; otherwise, this note shall mature at once. Any assignment or transfer of this note, or other obligations herein provided for, shall carry with it the said collateral securities and all rights under this agreement.

"And I hereby authorize the holder hereof on default of this note or any part thereof, according to the terms hereof, to sell said collateral, or any part thereof, at public or private sale and with or without notice, and by such sale the pledgor's right of redemption shall be extinguished. C. B. HOFFMAN."

The provisions of the negotiable instruments law, which it is claimed are applicable to the note, are as follow: [quoting N. I. L. §§ 1, 2, 4, 5.].

The defendant contends that under these provisions of the statute the note is nonnegotiable for three reasons: (1) It is not for a sum certain; (2) it is not due at a fixed or determinable future time; (3) it contains promises to do acts in addition to the payment of money.

If for any of the reasons suggested the note is nonnegotiable, the case should have gone to the jury on the evidence offered in support of the plea of a failure of consideration, and, on the other hand, if it be held negotiable it was error to direct a verdict in view of the defendant's evidence which tended to show that the bank was not a holder in due course. Although the failure to submit the issues of fact to the jury requires a reversal, it is necessary to determine the question of the negotiability of the note.

In our opinion the most serious objection to the form of the note, the particular provision which most clearly destroys the negotiable character of the instrument, is the agreement as to matters other than the payment of money. This is the stipulation by which the maker agrees to deliver, when demanded, additional collateral security to the satisfaction of the holder, in default of which the note shall mature at once. It would hardly be different if the note recited that it was secured by a chattel mortgage upon certain live stock and contained an agreement that in case their value should depreciate and the holder should deem the security insufficient the maker would on demand execute and deliver to the holder a mortgage upon certain real estate for such amount as would satisfy the holder, and that otherwise the note should mature at once. Such an instrument would not be an unconditional promise to pay money but would be a promise to do something in addition thereto, and would fall, as we think this instrument falls, within the principle settled by the case of Killam *v.* Schoeps, 26 Kan. 310. . . .

The negotiable instruments law, which is merely declaratory

of the mercantile law on the subject, contains a provision which, as we construe it, makes the note in the instant case nonnegotiable. Section [5] reads: "An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable." The section then enumerates certain things which are not to be regarded as falling within the inhibition. None of these exceptions covers such a promise as the one under consideration.

The note is nonnegotiable for the further reason that the same provision renders doubtful and uncertain the time at which it shall become due. If the maker shall fail when demanded to furnish additional security to the satisfaction of the holder the note shall mature at once. It is argued that this is no different in principle from the provision that default in the payment of any installment shall accelerate the maturity of the note, and cases are cited in which we have held that a similar provision will not render the note nonnegotiable. (See Clark *v.* Skeen, 61 Kan. 526.) The negotiable instruments law itself expressly declares that a negotiable instrument may contain provisions of this kind. [N. I. L. §§ 2, 4.] The distinction between such a stipulation and the one in question lies in the fact that in the one instance the maturity is accelerated by the default of the maker alone and the default is to consist in his failure to pay money. Here the maturity of the note is to be accelerated by the failure of the maker to do something in addition to the payment of money, and both contingencies are made to depend upon something over which he has not the absolute control. It is within the power of the holder by refusing assent to what the maker has done arbitrarily to make the note due at any time between the date of its execution and six months thereafter. If the holder is not satisfied with the additional security the note matures at once, and thus the time at which it may mature would depend upon the time at which the holder declared himself dissatisfied with the security delivered by the maker. The effect of this stipulation is to leave the time when payable uncertain and indefinite. (Bank *v.* Bynum, 84 N. C. 24; Brooks *v.* Hargreaves, 21 Mich. 254; Kimpton *v.* Studebaker Bros. Co., 14 Idaho, 552; Savings Bank *v.* Strother, 28 S. C. 504; Wisconsin Yearly Meeting *v.* Babler, 115 Wis. 289; Continental National Bank *v.* McGeoch and others, 73 Wis. 332. See, also, Iowa Nat'l Bank *v.* Carter, 144 Iowa, 715.)

The law of commercial paper, like all other substantive law, is the creature of growth. Founded on the custom and usages of merchants, it is the combined result of reason and experience slowly modified by the necessities and changes in commercial affairs. The methods of modern business and the interests of maker and holder alike require the deposit of collateral securities with the power in the holder to sell the same at maturity. The oft-repeated epigram of Chief Justice Gibson in the opinion in Overton *v.* Tyler, 3 Pa.

St. 346, that "a negotiable bill or note is a courier without luggage" (p. 347) has lost much of its aptness since 1846. . . . In former opinions this court has frequently referred to the conflict of authority in the decisions respecting the effect of collateral provisions of this character in promissory notes and bills of exchange. (Lyon *v.* Martin, 31 Kan. 411; Bank *v.* Gunter, 67 Kan. 227, 233.) The adoption in recent years of the negotiable instruments law by so many of the states was in response to the general desire for uniformity in respect to commercial paper. The application, however, by the courts of legal principles to particular facts has not reached scientific exactness and never will. It is hardly to be expected, therefore, that the courts of the different states which have adopted the act will always agree in the construction and application of its provisions. Actual uniformity in the law of negotiable instruments will remain a dream more or less iridescent; substantial uniformity is all that can be hoped for. The conclusions we have reached with respect to the instrument in question are in harmony with the former decisions of this court and accord with our view of the proper construction to be given to the language of the statute.

The trial court erred in holding the instrument negotiable and in directing a verdict. The judgment is therefore reversed and the cause is remanded for further proceedings in accordance with these views.[1]

[1] See 35 L. R. A. (N. S.) 390 note; L. R. A. 1915 B, 472 note; 15 Mich. L. Rev. 512; Acceleration Provisions in Time Paper, Z. Chafee Jr., 32 Harv. L. Rev. (May, 1919).

INDORSEMENT

ANONYMOUS

OHIO COMMON PLEAS. 1882.

26 Alb. L. J. 61.

THE suit was by the holder against the drawer of a check. The check was payable to order, duly indorsed in blank, and transferred to the plaintiff. On presentation the bank, drawee, demanded that the holder should also indorse it. This he refused to do, and thereupon had the check protested, and brought this suit. Judge Jones holds that the bank had no right to make such requirement, although it was proved that such was the local custom, and holds that the check was properly dishonored. . . .

JONES, J. A bank is ordinarily presumed to know the signatures of its own customers and depositors; but it will not be seriously doubted that when a check is drawn on a bank, which is a stranger to the payee and his signature, the bank is entitled to a reasonable time in which to ascertain the guenuineness of the indorsement, before paying a check payable to his order; and indeed some of the authorities seem to justify a bank or banker in calling on the holder of such a bill or check, when it is reasonable to do so, to furnish proof that the indorsement is the genuine one of the payee; but in this case neither of these things was required or asked; there was no demand by the bank for proof of the signature, nor for a reasonable delay to satisfy itself of the genuineness of the indorsement, but there was simply an absolute refusal to pay, unless the person who presented the check would indorse it. That this refusal to pay without such indorsement is not justified by commercial law, is, we think, perfectly clear; it is an attempt to limit the negotiability of such paper, and to fix terms and conditions for its payment not warranted by the law or by the drawer of the check, and to which neither he nor the holder is obliged to submit. The implicit contract of a bank with its customers is to pay their checks according to the law merchant.

HADDOCK, BLANCHARD & CO. *v.* HADDOCK.

COURT OF APPEALS, NEW YORK. 1908.

192 N. Y. 499.

APPEAL from a judgment of the Appellate Division affirming a judgment in favor of the plaintiff.[1]

[1] The statement of facts is condensed from the opinion.

The plaintiff is a wholesale dealer in coal. Three retail coal corporations, of which the defendant owned substantially all the stock, sought credit with the plaintiff. The defendant was told that the financial responsibility of these companies was unsatisfactory, and replied that they were his companies and he would guarantee their credit by indorsing their paper. The plaintiff drew thirty drafts on one or the other of these companies for the price of coal sold them, payable to the order of itself as payee, each of which was accepted by the drawee and indorsed by the defendant before delivery for the accommodation of the acceptor.

The drafts or bills were all similar in form, and the following is a copy of one of said bills:

"1327.41-100.

COAL OFFICE OF HADDOCK, BLANCHARD & CO.,
INCORPORATED.

NEW YORK, *Apl.* 28, 1902.

Four months after date pay to the order of ourselves Thirteen hundred twenty-seven and 41/100 Dollars. Value received and charge the same to account of Haddock, Blanchard & Co., Incorporated.

C. N. BLANCHARD,
Asst. Treas."

To MONTAUK Co.,
BROOKLYN, N. Y.

Indorsed across the face:

"Accepted. Payable at The Binghamton Trust Co., Binghamton, N. Y. The Montauk Coal Co.

CHAS. B. SMITH, *Treas.*"

Indorsed on the back:

"Haddock, Blanchard & Co., Incorporated. C. N. Blanchard, Assistant Treasurer.

"JOHN C. HADDOCK."

One of the retail companies also made a note to the plaintiff's order, which was indorsed by the defendant before delivery for the accommodation of the maker.

The bills and note were thereafter indorsed by the plaintiff and discounted at a trust company. They were not paid at maturity and were duly protested, notice being given to the plaintiff and the defendant. The plaintiff was compelled to take them up, and now sues the defendant on his indorsements.

CHASE, J. As the facts are found, if the intention of the parties is to prevail, the defendant should be required to pay to the plaintiff the amount of such note and bills as established by the judgment.

The defendant contends that the position of his name upon the note and bills conclusively establishes that he indorsed the several instruments without liability to the plaintiff and that parol evidence

should not have been received to affect or overcome the alleged conclusive presumption arising from his indorsements as made. . . .

It was well settled in this state for many years prior to the enactment of the Negotiable Instruments Law that a person who puts his name on the back of a bill or note before its delivery, is presumably a second indorser and not liable to the payee, but the presumption could be rebutted by parol evidence to show that the intention of the indorser was to become surety for some prior party to the instrument. . . .

The Negotiable Instruments Law was first enacted in this state in 1897. [§ 63 was quoted.] The defendant was within this definition an indorser of each of said instruments.

Section [64] of the said law provides: "Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

"1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

"2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

"3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."

By this section of said law the presumption as established by the courts in this state was changed, and an irregular indorser is now presumed to be liable in accordance with the express language of the statute. Questions relating to the sufficiency of the pleadings are settled by the statute. A complaint upon a note or bill without alleging a collateral agreement between the parties whose names are on the instrument seeking to recover against a person except as provided by the statute, would clearly be demurrable.

The note of the Lenape Coal Company was payable to the plaintiff, a third person, and the defendant, according to the provisions of said section [64], is liable to the plaintiff, the payee therein. No serious contention has been made to the contrary. The serious question for consideration arises from the fact that the bills were payable to the maker and drawer thereof respectively and the defendant as an indorser thereon before delivery is not under the statute *prima facie* liable thereon to the plaintiff. Should parol evidence have been allowed to show the intent of the parties? We have not discovered any exception to the rule as established by the courts of this state allowing parol evidence as between the parties whose names appear on the bill or note to determine their liability as between themselves. It is frequently stated that where a note is payable to a person other than the maker and is indorsed by a third person before delivery the intention of the indorser is ambiguous and uncertain on the face of the paper and such uncertainty justi-

fies the receipt of parol evidence to determine the true intention of the parties. We do not see that any greater certainty exists upon the face of a bill as to the true intention of the parties where it is drawn to bearer or to the order of the maker, and it is indorsed by a third person after acceptance by the acceptor and before delivery to the payee and maker. There is a certain rule of presumption determined by common law or by statute, but the alleged reason for the rule in either case is not very apparent. The long-established rule to allow parol evidence that the intention of the parties may prevail seems to have met with somewhat general approval without discussing specifically the principles upon which such evidence is admitted. . . .

It must constantly be borne in mind that the acceptance of a bill makes the acceptor the principal debtor. A bill when accepted becomes similar to a promissory note, the acceptor being the promisor and the drawer standing in the relation of an indorser. (Daniel on Negotiable Instruments [5th edition], section 532.) There is nothing in the Negotiable Instruments Law to indicate an intention on the part of the legislature to change the rule as established in this state relating to the receipt of parol evidence to determine the primary liability as between the persons whose names appear upon the instrument or as between those secondarily liable thereon. [N. I. L. § 29 was quoted.]

Parol evidence is necessary to determine whether a party to an instrument, including an indorser thereon, is an accommodation party, and also to determine which other party to the instrument he had accommodated. The plaintiff was the holder of the note for value, and the evidence showed that the defendant was an accommodation indorser for the benefit of the acceptor.

The last subdivision of section [64], as we have quoted, makes parol evidence necessary to establish whether the indorser signed the instrument for the accommodation of the payee. It is true that this section does not expressly state that if the indorser signed for the accommodation of the acceptor he is liable to all parties subsequent to the acceptor, but the fact that such a provision is not included in section [64] does not prevent the admission of parol evidence to determine generally the questions relating to an accommodation party as provided by section [29]. [N. I. L. §§ 195 and 68 were quoted.]

As we have seen, upon the acceptance of the bill the acceptor becomes the principal debtor and the one primarily liable to pay the amount of the bill, and all other parties to the instrument, including the maker and indorser, are secondarily liable. We are of the opinion that the maker of the bill is in legal effect and within the intention of this section an indorser, and that as between the plaintiff and the defendant parol evidence is authorized to determine the liability as between them.

The articles of the Negotiable Instruments Law relating to the presentation of bills and notes for payment and notice of dishonor (Articles [VI] and [VII]) further show an intention by the legislature to leave the order of liability among those whose names are on the instrument subject to determination by any competent evidence. [N. I. L. §§ 70, 79, 80, 89, and 115–3 were quoted.]

There is no reason that we can conceive why the legislature should intend to change the rule in regard to the admission of parol evidence as it had existed in this state for many years. All of the quotations that we have made from the Negotiable Instruments Law show that it has enlarged rather than restricted the rules allowing parol evidence to show the true liability and relation of the parties whose names appear upon the bill or note in all actions between themselves. It is certainly very material to the drawer of a bill whether an indorser signs it at his request or at the request and for the benefit of the acceptor. We do not think it was the intention of the legislature by the enactment of section [64] of the Negotiable Instruments Law to establish a rule as to the liability of an irregular indorser conclusive on the parties to the instrument as between themselves in an action where the facts showing a different intention are fully alleged. All of the decisions of our courts since the enactment of the Negotiable Instruments Law tend to sustain the views herein expressed. (Corn *v.* Levy, 97 App. Div. 48; Kohn *v.* Consolidated Butter & Egg Co., 30 Misc. Rep. 725.) . . .

The judgment should be affirmed, with costs.

CULLEN, Ch. J., HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur.

Judgment affirmed.[1]

HARVEY *v.* TOWERS.

COURT OF EXCHEQUER. 1851.

6 Ex. Rep. 656.

POLLOCK, C. B. The rule must be absolute to enter a nonsuit. This is an action on a bill of exchange, with a plea of fraud, which, according to the ordinary course of pleading, contains an allegation, not merely that the bill was obtained by fraud, but also that the plaintiff gave no value for it. In point of law, the latter allegation is necessary to make the plea good; for, notwithstanding the bill may have been concocted by fraud, or stolen, or the party may have been swindled out of it, that is no defence, unless the holder obtained it without value. At the trial, my Brother Martin ruled, that proof of fraud did not cast upon the plaintiff the burden of proving consideration; but he took the opinion of the jury as

[1] See, Some Necessary Amendments of the Negotiable Instruments Law, J. D. Brannan, 26 Harv. L. Rev. 588 (1913).

to the existence of fraud, and reserved leave to the defendant to move to enter a verdict on those pleas, if the Court should be of opinion that the onus of proving consideration was thrown on the plaintiff; or, if the plaintiff preferred it, a nonsuit was to be entered. A motion was made on behalf of the defendant to enter a nonsuit. Several matters were urged in argument, to which it is unnecessary to advert. The material question is, whether, when a plea of fraud is proved, does that call upon the holder of the bill to prove that he gave value for it? As a general question of law, that was established long ago, when a defendant was not embarrassed by the rules of pleading. At one time, some Judges thought that if a bill was shewn to be an accommodation bill, especially if the plaintiff had notice of it, that cast on him the burthen of proving consideration. I agree with what my Lord Campbell said in Smith *v.* Braine, that no principle can be extracted from the cases on this subject before the New Rules. But it is now settled, that if a bill be founded in illegality or fraud, or has been the subject of felony or fraud, upon that being proved the holder is compelled to shew that he gave value for it. That was established in Bailey *v.* Bidwell, and subsequently, by the Court of Queen's Bench, in Smith *v.* Braine, in a considered judgment. It has been contended that, as a matter of pleading, that view cannot be supported. I think, however, that as a plea must contain everything necessary to constitute a good defence, and as the mere fact of fraud would not afford any defence unless the holder took the bill without value, it was incumbent upon the defendant to allege that fact in his plea, and the question is, on whom is cast the onus of proving it. I confess I had some difficulty in understanding the argument, that the Judge must decide as to the *mode* of proof. With respect to the illustration given from the case of an unstamped bill, no doubt the Judge is to decide whether the bill is properly stamped, but the reason is purely technical, viz., that wherever a question arises as to the admissibility of a document, the facts upon which it depends must be decided by the Judge, — it is a sort of intermediate issue. It is wrong to apply that to the present case, for the Judge has nothing to do with the mode of proof, he only determines whether there is any evidence at all, and the jury decide whether the fact is in reality proved. The cases of Bailey *v.* Bidwell and Smith *v.* Braine shew that my brother Martin was wrong in ruling that proof of fraud alone, in the absence of proof of want of consideration, was not a good defence. As to the other points, since the plaintiff chose to rely upon the opinion of the Judge and declined to give evidence of consideration, he must be bound by that arrangement, and I see no equity to induce us to grant a new trial. The rule will therefore be absolute to enter a nonsuit.

ALDERSON, B. I am of the same opinion. I consider the form

of pleading to be quite right, and the ruling in Bailey *v.* Bidwell and Smith *v.* Braine to be right also. At first it would seem unnecessary in a plea like this to aver that the plaintiff gave no consideration, if that fact is to be inferred from proof that the bill was obtained by fraud. But when the whole record is considered, that is not the correct view. The declaration contains an averment that there was an indorsement of the bill to the plaintiff. That is an ambiguous expression, and may mean either an indorsement simpliciter to part with the possession, or an indorsement for a valuable consideration. If therefore fraud alone is pleaded, that does not negative the averment in the declaration taken in the latter sense, and the plea would be bad, because consistent with the fact of the indorsement having been made for a valuable consideration. It consequently becomes necessary to add, that the bill was not passed to the plaintiff for valuable consideration, and so fix the sense on which the indorsement mentioned in the declaration is to be understood; then, if the plaintiff intends to say, that the averment means that there was an indorsement to him for value, he must say so in his replication; and he must prove it, because he has in fact made the averment in his declaration.

PLATT, B. I am of the same opinion. Bailey *v.* Bidwell and Smith *v.* Braine were the decisions of eight Judges, that if a bill be once infected with fraud or illegality, the consideration becomes a subject-matter to be proved by the plaintiff. There is no hardship in such a rule, for the plaintiff must best know what consideration he gave for the bill; and besides, he claims under the party who committed the fraud. Here there was evidence to justify the verdict of the jury in finding fraud, and no evidence of consideration.

MARTIN, B. Substantially this case is decided by Bailey *v.* Bidwell and Smith *v.* Braine. But, although I consider myself bound by those authorities, I own I do not understand them. Here is a plea in which several facts are alleged, all of which are necessary to make it good, the plaintiff by his replication puts the whole in issue; and how the proof of one of those facts shifts the burthen of proof as to the other, I must confess I do not understand. Still such is the law, and I am not sorry for it; because such a rule, no doubt, throws difficulties in the way of recovering on fraudulent bills.

Rule absolute to enter a nonsuit.[1]

[1] See, Preliminary Treatise on Evidence, J. B. Thayer, chapter IX; 4 Wigmore on Evidence, §§ 2483–2489; Two Burdens of Proof, Austin Abbott, 6 Harv. L. Rev. 125 (1892).

LEAVITT *v.* THURSTON.

SUPREME COURT, UTAH. 1911.

38 Ut. 351.

STRAUP, J. This is a suit on a negotiable promissory note alleged to have been executed and delivered by the defendant to the Southern Missouri Jack Company, a corporation, and by it sold and transferred to the plaintiff. It was stipulated and agreed on the trial that the note was obtained by the company from the defendant by fraud and misrepresentations. The issue tried to the jury was as to whether the plaintiff was a holder in due course. A verdict was rendered in favor of the defendant. The plaintiff appeals.

The court, among other things, charged the jury that every holder is deemed prima facie to be a holder in due course; that by "holder in due course" is meant one who becomes a holder of the instrument before it is overdue, and who takes it in good faith and for value, and at the time it is negotiated has no notice of any infirmity in the instrument or defect in the title of the person negotiating it. The court further charged "that under the admitted facts in the case the Southern Missouri Jack Company, which transferred said note to the plaintiff, obtained the signature to said note by fraud, and that such admitted facts place the burden of proof upon the plaintiff to prove by a preponderance of the evidence that he is a holder in due course as above explained." Complaint is made on this instruction. [N. I. L. § 52 was quoted.]

By section [59 it is provided] that: "Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course," etc. Under such a statute it is very clear that, when it was shown that the title of the company which negotiated the note to the plaintiff was defective, the burden was on the plaintiff to show that he acquired title as a holder in due course as defined in section [52]. Citation of authorities in support of a proposition so plainly declared by the statute would seem unnecessary. We, however, refer to section 168, p. 228, of Selover on Negotiable Instruments (2d Ed.), and the cases there cited; and especially refer to Parsons *v.* Utica Cement Mfg. Co., 80 Conn. 58; Regester's Sons Co. *v.* Reed, 185 Mass. 228; Hodge *v.* Smith, 130 Wis. 326, and Bank *v.* Jordan, 139 Iowa 499.

The appellant, however, urges that the burden, cast upon him when fraud was shown in the inception of the note, was discharged by the giving of his testimony that he purchased the note in good faith for value before maturity in the usual course of business and

without notice of the fraud; and that the burden then shifted to the defendant to show that the plaintiff took the note with knowledge or notice of the fraud. Here counsel confuse the term, "burden of proof" — the *onus probandi* — which does not shift, with that of the "burden or duty of proceeding," or going forward, which in the course of the trial upon various facts may, and frequently does, shift from one party to the other. Whenever the existence of any fact or facts is necessary in order that a party may make out his case or establish a defense, the burden of proof — the *onus probandi* — is on such party to show the existence of such fact or facts. That burden does not shift and is unaffected by the evidence as the trial proceeds. After all the evidence is in, the one having the burden will lose unless the evidence bears more heavily in his favor. Upon proof of fraud in the inception of the note, the statute undoubtedly casts on the holder, not only the mere duty or burden of proceeding or of going forward, but the burden of establishing the existence of facts showing that he, or some person under whom he claims, acquired title as a holder in due course, and as defined in section [52], which includes the fact that at the time the note was negotiated he, or the person through whom he acquired title, had no notice of the fraud or infirmity. If evidence is given by him tending to show that he was such a holder in due course, that does not then shift the burden of proof to the defendant to establish the fact that he, or the person from whom he acquired title, had notice or knowledge of the fraud, or that no value was paid for the note, or that it was purchased overdue, but merely the duty of proceeding in the production of evidence if he desires to meet or overcome the effect or weight to be given the evidence so adduced by the holder. But, upon all the evidence on such issue, the holder will lose unless the evidence bears more heavily in his favor. We think the charge in this particular was right.

It is further urged that the plaintiff, after the admission of fraud in the inception of the note, having testified that he in good faith purchased the note before it was overdue, for value, and without notice of the fraud, or of any infirmity of the note, and no evidence on behalf of the defendant being introduced to contradict the plaintiff, or refute his testimony, was entitled to a verdict directed in his favor. Where a note was defended against on the ground of fraud in the inception of the note or fraudulently put into circulation, and where the plaintiff testified that he in the due course of business acquired the note in good faith before maturity for value and without notice, and the defendant introduced no testimony to contradict the plaintiff, it has been held that the defendant was entitled, nevertheless, to go to the jury on the question whether the plaintiff took the note for value and without notice of the fraud. (Bank *v.* Fountain, 148 N. C. 590; Bank *v.* Iron Works, 159 Mass. 158.) The facts of the case in hand do not require us to go to that

extent, for the circumstances of the transaction under which the plaintiff acquired the note, as testified to by him, themselves cast suspicion upon the questions of his good faith, his innocence of the fraud, and the value paid by him for the note. While a jury may not arbitrarily disbelieve a witness and reject his testimony, neither are they bound to accept a fact as established merely because he testifies to it, when the circumstances render its existence, or the testimony of the witness, improbable or doubtful. We think that the evidence was such that the issue as to whether the plaintiff took the note for value and without notice of its infirmity was for the jury.[1]

[1] Because of error on another point, judgment was reversed and the case remanded for a new trial.

The same rule as to burden of proof under § 59 applies when the maker sues in equity for cancellation of the instrument. Lundean *v.* Hamilton, 169 N. W. 208 (Ia. 1918); Regester's Sons Co. *v.* Reed, 185 Mass. 228 (1904), Mills *v.* Keep, 197 Fed. 360 (1912).

MODE OF TRANSFER

HOOD *v.* STEWART.

COURT OF SESSION, SCOTLAND. 1890

17 Ct. of Sess. Cas. (4th Series) 749.

LORD JUSTICE-CLERK.[1] The pursuer is the holder of a bill drawn by M'Guffie, Sillars, & Company — a firm now bankrupt — on the defender, and it has been, in my opinion, clearly proved that the pursuer gave value for it. This bill is not endorsed, and the pursuer alleges that this was an oversight, and upon the evidence I am satisfied that the fact is so, and that the transferors would have endorsed the bill at once had the oversight been pointed out. But however that may be, M'Guffie, Sillars, & Company cannot now place the pursuer in any better position than that which he held at the date of their sequestration. The case must, therefore, be considered upon the footing that the pursuer is the holder of a bill, which he could have called upon the drawers to endorse but failed to do so. Now, had M'Guffie, Sillars, & Company given value for the bill, and then obtained value from the pursuer, it can hardly be questioned that the pursuer would have been entitled to recover as having possession of the bill against the acceptor, even although circumstances prevented him from obtaining endorsation of the drawer. But the defender here pleads that the bill was an accommodation bill, and that as the drawers gave no value for it, the pursuer cannot have any higher right against the acceptor by possession of the bill than the drawer had. The Lord Ordinary, on the other hand, holds that this is not so, and I agree with his Lordship. The bill being an accommodation bill upon the defender's own showing, it was given that the drawers might obtain money upon it from another on the strength of his acceptance. The fact that the drawer gave no value is of no consequence. That was the basis of the transaction, and pleadable against the drawer, but not against the *bona fide* discounter, who gave to the bill the effect intended both by drawer and acceptor by giving the drawer money in exchange for the obligation it contained against them both. Value having been proved, I think the Lord Ordinary has rightly disposed of the case, and move your Lordships to adhere to his interlocutor.

LORD RUTHERFURD CLARK. The pursuer sues the defender on a bill of exchange drawn by M'Guffie, Sillars, & Company, and accepted by the defender. The bill is not endorsed by the drawer.

[1] The statement of facts is omitted.

At common law the pursuer could not sue on the bill. His title to sue depends on the 31st section of the Bills of Exchange Act 1882.[1]

I concur with the Lord Ordinary in holding that the bill was transferred by the drawer to the pursuer for value. Indeed that fact was not seriously disputed. Hence by virtue of the section of the Act to which I have referred, the transfer gives the pursuer such title as the transferor had in the bill.

As I read the statute, the transfer divests the transferor of all title to the bill, and invests the transferee with the title of the transferor. The divestiture and investiture are both completed by the act of transference. Henceforward the title of transferor is in the transferee, not in the sense that the latter is entitled to make use of a title which is still in the transferor, but in the sense that the title of the transferor is in the person of the transferee. Nor is the title of the transferee incomplete. It would not be a title if it were. It is as complete in his person as the title of the transferor was in his. In other words, he has a title equivalent to a duly intimated assignation.

It was urged that the change of title to a debt could not be complete without intimation to the debtor. The simple answer is that the statute gives the title to the transferee by the act of transference, and gives him not an incomplete but a completed title. Nor is there anything in this contrary to legal principle. The contract contained in a bill of exchange is of that nature that the *jus crediti* under it is transferable without notice to the debtor. For endorsement at once divests the endorser and invests the endorsee.

But the title obtained by transference is not necessarily the same as the title obtained by endorsement. It is well known that an endorser may confer on an endorsee a better title than he himself possessed. This cannot happen in the case of mere transference. The transferee acquires the title of the transferor and nothing more. Hence such exceptions may be stated to the pursuer's title as might have been stated against the title of transferor, as in an assignation, *utitur jure auctoris*, and if the title of his author is bad his own is no better. But no case of this kind arises here. It is not said that the title of the transferor was bad, and hence no objection can be stated to the title of the pursuer.

The true purpose of the defender is to plead compensation, and this plea might have been good if the pursuer had no title in himself, but was only availing himself of a title which still remained in the transferor. But as I have already said, the title of the pur-

[1] § 31 (4): "Where the holder of a bill payable to his order transfers it for value without endorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor." Cf. N. I. L. § 49, first sentence.

suer was complete from the date of the transference, and as it is trite law that compensation does not operate *ipso jure*, there is no ground for saying that by reason of the fact that the defender was at the date of the transference a creditor of M'Guffie, Sillars, & Company to an amount equal to the sum contained in the bill, there was no debt to transfer. Compensation must be pleaded in order to be effectual, and as that plea cannot be urged against an assignee holding a duly intimated assignation, so it is equally unavailing against the pursuer. It is equally clear that debts subsequently contracted by M'Guffie, Sillars, & Company to the defender cannot be pleaded against the pursuer.

For these reasons I think that the interlocutor of the Lord Ordinary should be adhered to. . . . *The Court adhered.*

CHAPPELEAR *v.* MARTIN.

SUPREME COURT, OHIO. 1887.

45 Oh. St. 126.

THE suit was brought by the adminsitrator of Huldah J. Turner to foreclose a mortgage executed by Chappelear and wife, securing certain notes executed by Chappelear, payable to "Huldah J. Turner or bearer." No administrator was appointed until December 10, 1879. The defence was that Chappelear had at different times after Mrs. Turner's death and after maturity made part payments on the notes to Mr. Turner, "the then lawful holder and bearer thereof" who had the notes in his hands at each payment; and that the balance had been tendered to the administrator and paid into court. Chappelear knew that Turner was the mortgagee's husband, and that she was dead; also that she had directed her husband to collect the notes without the trouble and expense of administration, the payments being made in pursuance of that understanding. The lower court rendered judgment in favor of the plaintiff for the full amount of the notes less the amount tendered, and made an order of sale. A bill of exceptions was taken.[1]

MINSHALL, J. It will be observed that there was neither averment nor evidence that P. F. Turner, to whom the defendant made his payments, was the *owner* of the notes and mortage; the averment is that he paid to "the then lawful holder and bearer" of them. That is, he claims to have made payment to a person authorized to receive payment; this person not being the owner of the notes, could only have been authorized to receive payment upon them by being the agent of the owner. . . .

Now, who was the owner of the notes and mortage at the time the defendant made the payment claimed by him? Not Mrs.

[1] The statement of facts is condensed from the opinion.

Turner, for she had died on March 3, 1871, and the first payment was made after that time, April 1, 1871. The title had passed to the administrator of the deceased, and any agency she may have conferred on her husband in her life-time to collect the notes, had been revoked by her death. The defendant had knowledge of the death of Mrs. Turner at the time he made the payments, and, therefore, had knowledge that the husband had no right to receive payment under any authority that may have been conferred on him by her before her death. It is true that such power might have been conferred on him by will, but she conferred no such power in that way; she died intestate.

No question as to the weight of evidence is presented upon the record. The title of the administrator is not disputed, and no authority from him to make the collection is set up or claimed. The fact that the payment was made to a person who had the notes in his possession at the time, must be taken in connection with the admitted fact that his possession was referable to an authority that had been conferred on him by the deceased, and was revoked by her death. Hence as no authority derived from the administrator was asserted, and as the evidence showed that any authority derived from a mere possession of the notes had been revoked, there was a total failure of proof upon the only issue of fact in the case — that he had paid to the lawful holder and bearer of the notes.

The defendant makes no other claim as to the right of the husband to receive payment. The circumstances show that he had no such authority, and as he was fully acquainted with the facts, he must be held to have known the law applicable to them.

A number of cases have been cited in support of the claim of the plaintiff in error; but none of them go to the extent of holding that payment to the holder of a note payable to bearer will constitute a defense against the owner, where the holder had no authority to receive payment and the maker had notice of the facts. The principal case relied on is that of Pettee *v.* Prout, 3 Gray, 502. It was a suit upon a note payable to a person named, or bearer. The title of the plaintiff was denied. He relied upon the production of the note. Shaw, C. J., delivering the opinion, said: "Where a plaintiff brings the note declared upon in his hand, and offers it in evidence, this is not only evidence that he is the bearer, but also raises a presumption of fact that he is the owner; and this will stand as proof of title, until other evidence is produced to control it." Such is the general rule as to the payment of a note payable to bearer; any person having it in possession may be presumed to be entitled to receive payment, unless the payer has notice to the contrary. 2 Dan. Neg. Inst., § 1230. "If a note is paid, not in the usual course of business, or to a person having the custody, but not authorized to receive payment, and that fact is known to the party paying, though the note be given up, it is no discharge

against the true owner." Per Shaw, C. J., in Wheeler *v.* Guild, 20 Pick. 545, 552, citing Kingman *v.* Pierce, 17 Mass. 247. "If payment be made to a person who assumes to be duly authorized, but in fact is not so, as if made to a person acting as agent, but not in fact an agent, or to a person purporting to be the personal representative of a party supposed to be dead, but who is in reality still living, the payment is invalid and a mere nullity." Story Prom. Notes, 7th ed., § 375. And the same is true of payment to an agent after the revocation of his authority by the death of the principal. *Id.* § 378.

In the case before us the maker is shown to have known that the payee was dead, and that the person who presented the notes for payment was simply acting under an authority that had been terminated by her death.

It is suggested that the husband might have become the owner of the notes by reducing them into possession with the consent of his wife before her death; or by purchase from her, or merely by her gift. This is quite true; but what does it avail here, since no such claim is made? The ownership of the notes and mortgage was not in question; hence inferences as to ownership were wholly immaterial — could not, in fact, arise in favor of a party who did not claim to be owner.

Judgment affirmed.

PARSONS *v.* THE UTICA CEMENT MANUFACTURING CO.

SUPREME COURT OF ERRORS, CONNECTICUT. 1909.

82 Conn. 333.

BALDWIN, C. J. The result of a former trial of this cause, in which a verdict was rendered for the plaintiff, is reported in 80 Conn. 58. On a second trial there has been a verdict for the defendant, and error is claimed in respect to the charge to the jury.

The complaint contains two counts, each alleging (as in Practice Book (1908) p. 438, Form 334) that $2,000 is due to the plaintiff from the defendant on an instrument under seal, of which a copy is annexed and marked as an exhibit. The first defense to each count was a general denial. A second defense to each was that the bonds, which were payable to bearer and matured January 1st, 1890, more than sixteen years before the suit was brought, were owned, in 1887, by the Continental Life Insurance Company, and were then fraudulently taken from its possession by the plaintiff's husband, who was its president, without any consideration moving to the company, and came into her possession with notice of that fact, without any consideration moving from her, and that she was never a bona fide holder. These allegations were denied by the reply.

On the first trial the jury were instructed that as the plaintiff had possession of the bonds, the burden of proof was on the defendant to show that she was not a bona fide holder, and that to do this it must satisfy them by a fair preponderance of evidence that she acquired the bonds either without paying any value, or knowing that her husband had taken them from the insurance company improperly and fraudulently. It having been an undisputed fact, during that trial, that her husband's title was defective, we held this charge erroneous, since the burden was upon her to show value paid or want of notice of the defect, not on the defendant to show no value paid or the existence of notice.

In support of this conclusion, we referred to the Negotiable Instruments Act [§§ 1, 52, 59]. Our attention is now called to the provision in [N. I. L. § 196] that the succeeding sections of the chapter, which include those above mentioned, shall not apply to negotiable instruments made and delivered prior to 1897.

The Negotiable Instruments Act, in most respects, was simply a codification of the common law in reference to the subject in hand. It was such in respect to the provision of [§59] that "every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course." [1] In Byles on Bills (Chap. IV, p. *60) the common law on this subject, with reference to the burden of proving a consideration, is thus stated: "The defendant is not in general permitted to put the plaintiff on proof of the consideration which the plaintiff gave for the bill, unless the defendant can make out a prima facie case against him, by showing that the bill was obtained from the defendant, or from some intermediate party, by undue means, as by fraud, felony, or force; or that it was lost, or that he received no consideration." Where, as here, it appears that the negotiable paper in suit, though there was nothing wrong in its original issue, was obtained from an intermediate party by fraud, proof of consideration is only called for from the plaintiff because it would tend to show that he nevertheless is a bona fide holder within the meaning of that term in the law merchant. Whether he acquired the paper by purchase or gift would, under ordinary circumstances, be of itself unimportant. But after proof that it was once in the hands of a fraudulent holder, it may justly be presumed to continue in the hands of a holder of that character, until the contrary be proved. Collins *v.* Gilbert, 94 U. S. 753, 761. The position of the holder of negotiable paper is of an exceptional character. He may acquire a title through a thief, and yet maintain it against the original owner. But his possession is not enough

[1] It is to be observed that the court omitted the last sentence of the section above quoted.

to support a recovery, after it once appears that he must trace title through fraudulent practices and unclean hands. Totten *v.* Bucy, 57 Md. 446, 452.

This is equally true whether the fraudulent practices were connected with the original inception of the paper, or, as in the present instance, occurred subsequently, to the prejudice of an intermediate holder. Fulton Bank *v.* Phoenix Bank, 1 Hall (N. Y.) 562; 2 Parsons on Notes & Bills, *283; 4 Amer. & Eng. Ency. of Law (2d Ed.) 322. The case of Kinney *v.* Kruse, 28 Wis. 183,[1] asserts the contrary, but is opposed to the strong current of authority.

The cause went to the jury, as respects each count, on two issues. One was on the truth of the complaint: the other was on the truth of the special defense.

As to the former issue, the plaintiff had the burden of proof from the outset and to the end. Lockwood *v.* Lockwood, 80 Conn. 513, 521.

As to the latter issue, her production of the bond, its due execution being admitted, raised a presumption of title which made out a prima facie case. But as soon as it appeared, either by her witnesses or those of the defendant, that this bond was fraudulently abstracted from the assets of a third party to which it originally belonged, this presumption no longer availed her, and her original burden of proof, only temporarily satisfied by its aid, rested upon her again, and now required her to show a title by affirmative evidence that she obtained the instrument both in good faith and for a valuable consideration. Her good faith she could only show by proof that, when the bond came to her, she had no knowledge of such fraud, and was not equitably chargeable with notice of it. Baxter *v.* Camp, 71 Conn. 245, 253; Fulton Bank *v.* Phoenix Bank, 1 Hall (N. Y.) 562, 577. The defendant, it is true, had the burden, for certain purposes, of proving that she took the bond with such notice and without consideration; but these purposes were accomplished when the fact was established of its fraudulent abstraction from the assets of the insurance company by her grantor. One legal presumption established by the law merchant was thus met with another legal presumption established by the same law, which by that law was sufficient to destroy it. In a concurring opinion, often quoted, given in a case of a similar character, in which a ruling of his at *nisi prius* was pronounced erroneous, Baron Martin observed that he did not profess to understand how, when several facts were alleged in a plea, all necessary to make it good, and all put in issue, proof of one could relieve a defendant from the burden

[1] The maker set up fraud upon the payee. Dixon, C. J., said, p. 188, "It is not perceived how that circumstance is available to the defendants as a distinct ground of defense, or for the purpose of changing the burden of proof." N. I. L. § 59 is said to codify both these propositions in Kinney *v.* Kruse. Crawford's Ann. N. I. L., 4th ed., p. 117.

of proving the rest; but that whatever might be the philosophy of that matter, the rule was so, and it was a useful one because it threw a difficulty in the way of fraudulent indorsements. Harvey *v.* Towers, 15 Jur. 544.

The charge to the jury in the Superior Court, which followed the rule as stated by us when the cause was previously here (Parsons *v.* Utica Cement Mfg. Co., 80 Conn. 58, 60), was in conformity to the principles of common law procedure prior to the adoption of the Negotiable Instruments Act. The instructions thus given were that while the plaintiff, as holder of the bonds, was prima facie their owner in good faith, if the defendant had satisfied them by a fair preponderance of evidence that they were fraudulently obtained from the true owner, the insurance company, then the burden rested on the plaintiff of proving that she acquired them in good faith and for a valuable consideration, without knowledge of the fraud, or without being chargeable with knowledge of it.

The law merchant which governed the disposition of the cause gave to bona fide holders, in due course, of negotiable bonds payable to bearer, the valuable privilege of suing on them in their own name, with all the rights for the purposes of the action of an absolute owner. But it deemed no one a bona fide holder in due course who obtained possession without giving any valuable consideration in return. Brush *v.* Scribner, 11 Conn. 388. It recognized the bona fide holder in due course, not as owner, but as having the rights of an owner for the purposes of suit, to be protected no farther than the necessity of maintaining the free negotiation of commercial paper requires. Olmstead *v.* Winsted Bank, 32 Conn. 278, 287. There was no necessity of that description to call for the allowance of actions by holders of stolen securities who paid nothing for them, even if they accepted them before their maturity and with no notice of any infirmity in their grantor's title. They might be bona fide holders, but they were not holders in due course; for that term refers to due course of trade, and trade rests on an exchange of values. Roberts *v.* Hall, 37 Conn. 205, 212.

A copy of the record of certain decrees of the court, entered at previous terms, in another suit, brought to wind up the Continental Life Insurance Company, was offered in evidence by the plaintiff, in rebuttal, but excluded. One of these, passed soon after the time when she claimed that she acquired the bonds, placed it in the hands of receivers, and annulled its charter. Another, passed in 1897, finally discharged the receivers. This record was offered to show that the insurance company was not in a position to make any claim to the bonds.

A request by the plaintiff was also made and refused for an instruction to the jury that, it being undisputed that the insurance company was at one time owner of the bonds, and paid value for them, it would be no defense to this action against their maker,

should they find that the plaintiff paid no value for them, or acquired them from one who took them wrongfully from the company.

These rulings bring up the fundamental question whether the defendant, not denying that it issued the bonds originally for value received, can escape payment on the ground that they do not belong to the plaintiff, when no one else has made or is now in a position to make any demand upon it for the performance of the obligation which they express. They are payable to bearer. The time for their payment has arrived. They are presented by a bearer who has been such for sixteen years. How can it be a defense that a corporation, now extinct, was more than sixteen years ago their bearer and, were it still in being, might be entitled, as against the plaintiff, to reclaim their possession by a paramount title?

The bearer of such an instrument does not prove title by his possession. As already stated, his mere production of it entitles him to recognition as invested with the rights of an owner only so far as the necessities of trade require. Proof that another owns it, if not always admissible to show that he does not, is admissible at least where, as here, it tends to support the claim that he is a holder in bad faith.

It was undisputed that at some time the bonds in suit belonged to the Continental Life Insurance Company, and the defendant had introduced evidence tending to show that in November, 1887, they were fraudulently abstracted from its possession by the plaintiff's grantor. A natural inference from this evidence, if it stood unanswered, would be that the plaintiff had notice of his fraud. To prove that, soon after that fraud, the charter of the company was annulled and its affairs wound up, could not help to rebut this inference.

It was still within the power of the courts to revive it, and it could, if thus revived, sue for the vindicaton of its title to the bonds or to enforce their payment. Sullivan County Railroad *v.* Connecticut River Lumber Co., 76 Conn. 464, 474. Should, in such case, a suit of the latter description be brought against the present defendant, it may be that no plea of the statute of limitations would be set up. That statute may prevent a remedy, but cancels no debts. Belknap *v.* Gleason, 11 Conn. 160, 164.

Both of the rulings in question by the court below were therefore correct. . . .[1]

[1] *Contra*, Voss *v.* Chamberlain, 139 Ia. 569, 577 (1908, N. I. L.).

Possibly the last sentence of § 59 relates to defenses such as failure of consideration and payment, which arise after the inception of the instrument. See Atlas Bank *v.* Doyle, 9 R. I. 75, 78 (1868).

PURCHASE FOR VALUE WITHOUT NOTICE

ESKRIDGE *v.* THOMAS.

SUPREME COURT OF APPEALS, WEST VIRGINIA. 1916

79 W. Va. 322.

THE plaintiffs made a negotiable note and several renewals of the same instrument payable to Thomas, who endorsed them to the Traders National Bank in due course, which sued the makers and endorser. The makers then filed their bill against the Bank and Thomas to enjoin further prosecution of the action on the note, alleging usury, their lack of knowledge of its extent, and the need of purging the note of usury. An injunction was granted. From the overruling of a demurrer and the denial of a motion to dissolve the injunction, the Bank appeals.[1]

LYNCH, J. . . . It is contended that, although § 5, ch. 96, declares void all contracts for the loan or forbearance of money as to any excess of interest charged above the legal rate, yet, under sections 52, 55 and 57 of the negotiable instruments act, the defendant bank, as a holder in due course, took the instrument relieved of usury, if any, charged on the notes in the original transaction. Under § 52, it contends it was such a holder, because the instrument is complete and regular upon its face, was not overdue when negotiated, and the bank took it in good faith and for value, without notice that it had previously been dishonored, if such was the fact, or of any infirmity in the note or defect in the title of the endorser; that, under § 55, the title of Thomas was not defective, within the meaning of the act, unless he obtained the instrument or any signature thereto by fraud, duress or other unlawful means, or for an illegal consideration, or in breach of faith or under such circumstances as amount to fraud; and that, if he did so obtain it, respondent, as a holder in due course, took the instrument, by virtue of § 57, "free from any defect of title[2] of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

[1] The statement of facts is condensed from the opinion.

[2] Lindley, L. J., in Alcock *v.* Smith, [1892], Ch. 238, 263: "'Defect of title' is a phrase introduced into the Bills of Exchange Act in lieu of the old expression 'subject to equities,' which is an expression not adopted because the Act applies to Scotland as well as to England, and 'subject to equities' is an expresion not known to Scotch law."

Cf. B. E. A. § 38 (2) with N. I. L. § 57.

These sections do, it is true, attempt to afford ample protection to persons purchasing negotiable paper, and to give it such facility of circulation as the exigencies of commercial business may require; indeed, to obviate and avoid every impediment or obstruction that in any substantial degree tends to destroy confidence in instruments of that character. Business enterprises suffer inconvenience from anything that impedes the facile circulation of any medium of exchange with banking institutions or money lenders. Financial emergencies arrest their progress frequently, and require immediate resort for relief to the monetary centers of influence. Business and industrial activities of every character depend in large measure for success upon the readiness with which they can float their bills and notes, checks and other like instruments common in commercial usage. To meet these trade requirements, to facilitate the movement of capital, and to inspire confidence and correct some defects or deficiencies in the circulation of commercial paper, manifestly were some of the purposes to be subserved by the enactment of the negotiable instruments law.

But, conceding the wholesomeness, materiality and benign purpose of this legislation, that *concessum* can not be permitted to violate or ignore other equally beneficent and essential statutory provisions. These the law making branch of the government, not the court, must repeal or amend, if necessary, to suit public convenience. It is not within the power or province of judicial tribunals to say what the law ought to be. Courts exercise a limited authority. They can legitimately inquire only what the legislature intended when it enacted a statute. To them belongs the right of interpretation and construction, to ascertain what the principles governing a given state of facts are, and, when ascertained, to apply the principles to the facts, irrespective of the interests helped or hurt.

Unrepealed and unamended stands an enactment of an earlier date and of equal dignity with the negotiable instruments law. Long ago competent authority declared "all contracts and assurances made directly or indirectly for the loan or forbearance of money or other thing at a greater rate of interest than six per cent, except where such greater rate is now allowed by law, shall be void as to any excess of interest agreed to be paid above that rate, and no further." § 5, ch. 96, Code. This legislative declaration, taken from the code of Virginia, materially altered and amended a yet earlier statute forfeiting both principal and interest where the rate charged exceeded that fixed by law, and a subsequent one forfeiting the interest only. Now the contract or assurance is void only as to the excess of interest above the legal rate.

To bring the note in controversy within the protection of the negotiable instruments act, as contended by the bank, would in effect substitute "voidable" for "void" in § 5, ch. 96. Much

competent authority tends to support this argument. Ewell *v.* Daggs, 108 U. S. 145; Weeks *v.* Bridgman, 159 U. S. 547; Myers *v.* Kessler, 142 Fed. 130; Gordon *v.* Levine, 197 Mass. 263; Trust Co. *v.* Bank, 136 Mich. 460. The contrary proposition is upheld in numerous decisions of equally respectable courts. They declare unenforceable by an innocent holder any instrument by statute declared to be void because usurious, or because it arose out of gaming or other transactions in violation of a statute. These are collated in 4 Am. & Eng. Ann. Cas. 353. An act or contract so declared to be void has no legal force or effect. It is a nullity, and into it can be injected no vitality, although in some circumstances the conduct of the parties may be such as will upon equitable principles operate to estop them to deny they entered into or are bound by it, as where they accept the benefits thereof with knowledge of the infirmity. No currency in the market, and no degree of innocence or ignorance on the part of a holder for value, can impart validity to a negotiable instrument which is declared void by statute because based upon a gambling or usurious consideration. Daniel & Douglass Neg. Inst. § 221. Speaking of notes made void by statute, the Kentucky court said in Lawson *v.* Bank, 102 S. W. 324: A statute that makes such notes void "is of a police nature, intended to prevent imposition and fraud. The negotiable instruments act does not repeal this statute in terms nor does it by necessary implication. It has never been the policy of the courts to extend the doctrine of implied repeals further than the evident purpose of the last legislation required. The negotiable instruments statute is a most comprehensive piece of legislation. It goes into minutest detail in dealing with the subjects embraced by it. The whole scope of it is shown to be the dealing with commercial paper, so as to protect innocent purchasers against mere defenses available as between the original parties. It gives such paper currency, free from original defenses. But it applies to paper that might have been obligatory between the parties. But, where the parties were never bound because the law made the note void, as contrary to public policy as expressed in the statutes, the negotiable instruments act does not apply, and ought not to. The prevention of crime is of more importance than the fostering of commerce. The later act should be read in view of its purpose, and not as intending to repeal other statutes passed in the exercise of the police power of the state to suppress crime and fraud." That is in substance what this court said in Bank *v.* Jacobs, 74 W. Va. 525, in which it was held that a paper negotiable in form for money lost in gaming is, under § 1, ch. 97, Code, void in the hands of the holder, even though he took it for value without notice of the character of the consideration.

The obvious purpose and effect in enacting the negotiable instruments law was the embodiment of the general law merchant as it

had been previously applied by the courts. The presumption is that when passing it the legislature had in contemplation the existence of the usury statute and the decisions of Virginia and this state construing it as invalidating all contracts comprehended within its scope. It knew, as we must assume, that, by a prior general rule, where a statute declares an instrument void it gathers no vitality by circulation, although upon such instrument an endorser may be held liable to a bona fide holder without notice. Daniel Neg. Inst. 673. The Virginia court had already declared that as against an innocent holder no defense can be made against a negotiable instrument declared by the usury statute to be void. "The original taint adheres to the paper in whosesoever hands it may come. It is void, and the defense may be set up as well against the innocent holder as the usurer or gambler himself." Taylor *v.* Beck, 3 Rand. 323. Where there is nothing in a statute indicating an intention to the contrary, the well recognized doctrine is "that the legislature did not intend to innovate upon, unsettle, alter, violate, repeal or limit another general statute or statutory system the entire subject matter of which is not directly or necessarily involved in the subsequent act." Bank *v.* Jacobs, *supra.*

From these conclusions it follows that, as the rulings on the demurrer and motion to dissolve were not erroneous, our order will affirm the decree complained of, and remand the cause for further proceedings therein, agreeably with equitable principles governing courts of equity in cases of this nature.

Affirmed.[1]

FAIRBANKS *v.* SNOW.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1887.

145 Mass. 153.

HOLMES, J. This is an action upon a promissory note made by the defendant and her husband to the order of the plaintiff. The defendant alleges that her signature was obtained by duress and threats on the part of her husband. The judge below found for the plaintiff, on the ground, it would rather seem, that, whether there was duress or not, the defendant had ratified the note, which there seems to have been evidence tending to prove. See Morse *v.* Wheeler, 4 Allen, 570; Rau *v.* Von Zedlitz, 132 Mass. 164. But as this may not be quite clear, we proceed to consider the only exception taken by the defendant. The judge refused to rule that, if the defendant signed the note under duress, it was immaterial

[1] See, The Uniform Negotiable Instruments Law. Is it producing Uniformity and Certainty in the Law Merchant? Crawford, D. Hening, 59 U. of Pa. L. Rev. 489-491 (1911); 15 Mich. L. Rev. 509; L. R. A. 1918 C, 778, note.

whether the plaintiff knew, when he received the note, that it was so signed. The exception is to this refusal.

No doubt, if the defendant's hand had been forcibly taken and compelled to hold the pen and write her name, and the note had been carried off and delivered, the signature and delivery would not have been her acts; and if the signature and delivery had not been her acts, for whatever reason, no contract would have been made, whether the plaintiff knew the facts or not. There sometimes still is shown an inclination to put all cases of duress upon this ground. Barry *v.* Equitable Life Assurance Society, 59 N. Y. 587, 591. But duress, like fraud, rarely, if ever, becomes material as such, except on the footing that a contract or conveyance has been made which the party wishes to avoid. It is well settled that where, as usual, the so-called duress consists only of threats, the contract is only voidable. Foss *v.* Hildreth, 10 Allen, 76, 80. Vinton *v.* King, 4 Allen, 562, 565. Lewis *v.* Bannister, 16 Gray, 500. Fisher *v.* Shattuck, 17 Pick. 252. Worcester *v.* Eaton, 13 Mass. 371, 375. Whelpdale's case, 5 Rep. 119 a. 1 Bl. Com. 130.

This rule necessarily excludes from the common law the often recurring notion just referred to, and much debated by the civilians, that an act done under compulsion is not an act in a legal sense. *Tamen coactus volui.* D. 4. 2. 21, § 5. See 1 Windscheid, Pandekten, § 80.

Again, the ground upon which a contract is voidable for duress is the same as in the case of fraud; and is, that, whether it springs from a fear or from a belief, the party has been subjected to an improper motive for action. See Rodliff *v.* Dallinger, 141 Mass. 1, 6; Stiff *v.* Keith, 143 Mass. 224. But if duress and fraud are so far alike, there seems to be no sufficient reason why the limits of their operation should be different. A party to a contract has no concern with the motives of the other party for making it, if he neither knows them nor is responsible for their existence. It is plain that the unknown fraud of a stranger would not prevent the plaintiff from holding the defendant. Master *v.* Miller, 4 T. R. 320, 338. Masters *v.* Ibberson, 8 C. B. 100. Sturge *v.* Starr, 2 Myl. & K. 195. Pulsford *v.* Richards, 17 Beav. 87, 95. White *v.* Graves, 107 Mass. 325.

The authorities with regard to duress, however, are not quite so clear. It is said in Thoroughgood's case, 2 Rep. 9, that "if a stranger menace A. to make a deed to B., A. shall avoid the deed which he made by such threats, as well as if B. himself had threatened him, as it is adjudged 45 E. 3. 6." Sheppard, Touchstone, 61, is to like effect. See also Fowler *v.* Butterly, 78 N. Y. 68. But in Y. B. 43 E. III. 6, pl. 15, which we suppose to be the case referred to, it was alleged that the defendant was imprisoned by the procurement of the plaintiff. And we know of no distinct adjudication of binding authority that mere threats by a stranger, made

without knowledge or privity of the party, are good ground for avoiding a contract induced by them.

In Keilwey, 154 a, pl. 3, "the defendant in debt pleaded that he made the obligation to the plaintiff by duress of imprisonment [on the part] of a stranger, and the opinion of Rede and others was that this is not a plea without making the obligee party to this duress."

In Taylor *v.* Jaques, 106 Mass. 291, 294, it was said that the defendant had to prove that he signed the note "under a reasonable and well-grounded belief, derived from the conduct and declarations of the plaintiffs, that if he did not sign it he would be arrested," &c. See Green *v.* Scranage, 19 Iowa, 461, 466; Talley *v.* Robinson, 22 Grat. 888; Bazemore *v.* Freeman, 58 Ga. 276; and the cases as to purchasers for value; Clark *v.* Pease, 41 N. H. 414; Duncan *v.* Scott, 1 Camp. 100. See also Gilbert *v.* Stone, Aleyn, 35; S. C. Style, 72; Scott *v.* Shepherd, 2 W. Bl. 892, 896.

Loomis *v.* Ruck, 56 N. Y. 462, was decided on the ground that, if the non-negotiable note in suit was in the first instance a contract between the plaintiff and the defendant, it was obtained through the agency of the defendant's husband in such a way as to make the plaintiff answerable for his conduct. Moreover, the older writers likened duress to infancy, and took a distinction between feoffments, &c. by the party's own hand, and acts done by letter of attorney, regarding the latter as wholly void. 2 Inst. 483. Finch, Law, 102. It has been held in New York and some other States, as well as in England, that a power of attorney given by an infant is void. Fonda *v.* Van Horne, 15 Wend. 631. Knox *v.* Flack, 22 Penn. St. 337. Saunderson *v.* Marr, 1 H. Bl. 75. And if this supposed analogy were followed, the contracts in all the New York cases which we have cited would be void by the law of that State for want of a personal delivery by the defendant to the plaintiff. There may be still other explanations of the decisions.

In the present case it does not appear who delivered the note, and does not clearly appear that the defendant did not deliver it herself. The distinction as to powers of attorney has been limited, if not wholly done away with, in Massachusetts, in regard to infants. Whitney *v.* Dutch, 14 Mass. 457, 463. Welch *v.* Welch, 103 Mass. 562. Moley *v.* Brine, 120 Mass. 324. But we express no opinion as to the effect of duress upon such powers, oral or written.

On the case as it is presented to us, we are of opinion that the ruling requested was wrong upon principle and authority.

Exceptions overruled.[1]

[1] See, Speciality Contracts and Equitable Defences, J. B. Ames, 9 Harv. L. Rev. 57 (1895); Interests of Personality, Roscoe Pound, 28 Harv. L. Rev. 357–359 and notes; Readings in Roman Law, Roscoe Pound, 2d ed., 28–33; Sooy *v.* State, 38 N. J. L. 324, 329 (1876); Rau *v.* Von Zedlitz, 132 Mass. 164 (1882); Macke *v.* Jungels, 166 N. W. 191 (Neb. 1918).

MURRAY *v.* THOMPSON.

SUPREME COURT, TENNESSEE. 1916.

136 Tenn. 118.

MR. JUSTICE WILLIAMS delivered the opinion of the court.

This is a suit by complainant, a minor, to disaffirm a contract of indorsement of a note of which he was payee, and to recover the note from Thompson, indorsee.

Complainant while in the employ of a brick company received personal injuries, and the company executed to him a note of $1,750 in satisfaction of his claim to damages. The note was made payable June 1, 1915, which was the date on which complainant would arrive of age. On October 16, 1914, W. A Murray, the father of complainant, with the knowledge and authority of the latter, sold the note to Thompson, indorsing the name of the son without apprising Thompson of the fact that he himself was not the payee. The proceeds of the note were deposited to complainant's account in bank, and later were invested in a saloon business in the name of the father and son, and in a short time lost. There was no actual fraud on the part of complainant in the transaction with Thompson.

The chancellor decreed that complainant was entitled to disaffirm and recover; but the court of civil appeals reversed the ruling.

The last-named court was of opinion that complainant would have been entitled to the relief awarded by the chancellor under the rules of law in force before the passage of the Negotiable Instruments Law; but that said act, by its section 22, so changed the law as to deny complainant the remedy sought. The section thus relied on is as follows:

"The indorsement or assignment of the instrument by a corporation, or by an infant, passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon."

The question to be ruled seems never to have been passed on by any court of last resort. In its solution light may be afforded by a reference to the history and object of the Negotiable Instruments Law. It was drafted for the purpose of codifying the principal rules of the law merchant as announced in numerous decisions which were deemed to embody the best doctrine. It was not the purpose to change such of those rules as had been uniformly accepted, but rather to make the law certain and uniform by the adoption of that one of two or more rules (arising out of discordant decisions in different jurisdictions) which was thought to be the best pronouncement of commercial law.

One of the questions on which judicial decisions were in conflict was, whether an infant's indorsement of a negotiable instrument

was void or only voidable. This is demonstrated by what was said in Roach *v.* Woodall, 91 Tenn., 206, 212. . . .

It was to make certain and uniform the law on this point that section 22 was embodied in the Negotiable Instruments Act. In stipulating that the indorsement of the instrument by an infant "passes property therein," it was meant to provide that the contract of indorsement is not void, and that his indorsee has the right to enforce payment from all parties prior to the infant indorser. The incapacity of the minor cannot be availed of by prior parties.

It was not intended to provide that the indorsee should become the owner of the instrument by title indefeasible as against the infant, or to make the act of indorsement an irrevocable one.

The act does not concern the right of such an indorser to disaffirm under the rules of the law of infancy. The words "passes the property therein," if given a meaning that would deny that right in respect of a contract of indorsement, would deprive the infant of the right to reinvest in himself the title to the instrument against a holder who had knowledge of the indorser's infancy. The quoted words are not qualified so as to save his rights in such assumed case. It must be admitted that the legislature did not intend any such radical and grossly inequitable departure from a settled and salutary rule of law.

The Negotiable Instruments Law, in this section, is not to be treated as going further than did the corresponding section of the English Bills of Exchange Act, section 22, which provides:

"Where a bill is drawn or indorsed by an infant, minor or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto."

The English act was before the National Conference of State Boards of Commissioners, when the American act was drafted, and that there is such correspondence in meaning is the view expressed by Judge Brewster, president of the conference. The American act went no further. 10 Yale Law Journal, 84; Brannan, Neg. Ins. Law (2d Ed.), 185, 214; Norton on Bills and Notes (4th Ed.), 90, 285.

The act having no effect on the right of an infant to disaffirm, the precedents in relation to that right govern. This court in Roach *v.* Woodall, supra, held that the minor might disaffirm and avoid the act of indorsement, and an opinion was intimated (the facts did not call for a decision) that one who became holder of the note was chargeable with knowledge of the indorser's incapacity. The court used language that has pertinency to the facts of the pending case:

"A transferee who receives by delivery merely from bearer a note with the name of another indorsed upon it, ought to be charged with notice who that indorser was, and whether a person who could

in law bind himself by an indorsement. If he does not in fact know the indorser, he would hardly predicate anything of an indorsement, or rely on it without inquiry. Such inquiry would disclose the minority of the indorser, and, consequently, it might well be holden that the transferee was chargeable with notice of the invalidity of the indorsement."

The common-law rule[1] is that the purchaser and indorsee of such a note is not a *bona fide* holder as against an infant indorser, and that the latter may disaffirm and recover the note from the possession of the former, who takes with constructive notice of the incapacity. Hosler *v.* Beard, 54 Ohio St., 398; McClain *v.* Davis, 77 Ind., 419; Case *v.* Espenschied, 169 Mo., 215; 3 R. C. L. p. 1028, section 235; Id. p. 1086, section 292; 1 Daniel, Neg. Ins. (6th Ed.), 806a; 1 Parsons, Notes and Bills, 276.

The chancellor made a proper disposition of the case in his decree. The decree of the court of civil appeals is therefore reversed, and that of the chancellor affirmed.[2]

GUARANTY TRUST CO. *v.* HANNAY & CO.

COURT OF APPEAL, KING'S BENCH DIVISION. 1918.

[1918] 2 K. B. 623.

HANNAY AND COMPANY,[3] cotton brokers at Liverpool, bought cotton from Knight, Yancey and Company of Alabama, to be paid by shippers' drafts upon the Bank of Liverpool, the buyer guaranteeing acceptance and payment if the shipping documents proved to be

[1] The cases cited relate to lunatics. The text-books cited give no cases in point. The note in L. R. A. 1917 B. 1174, contains no cases of negotiable paper to support this alleged "common law rule."

[2] In the analogous situation of a chattel sold by an infant and resold to a *bona fide* purchaser, § 24 of the Uniform Sales Act declares the modern commercial policy of protection for the purchaser and repudiates the previous judge-made rule. (Williston on Sales, §§ 14, 342.) This modern policy should apply *a fortiori* to negotiable instruments, even though outside the terms of the Sales Act. For the extension of a broad legislation principle, instead of the judicial principle thereby superseded, see Common Law and Legislation, Roscoe Pound, 21 Harv. L. Rev. 383 (1908); and the following decisions: McGibbon *v.* Abbot, 10 A. C. 653, 663 (J. C. 1885); 25 Harv. L. Rev. 26, note 102—English statute on powers followed in Canada instead of prior English decisions. Smart *v.* Smart, [1892] A. C. 425 (J. C.) — custody of children over twelve given to another though statute related to children under twelve, and common law gave it to the father. Fitzwater *v.* Warren, 206 N. Y. 355 (1912); 26 Harv. L. Rev. 262 — assumption of risk. *Contra*, Admiralty Commissioners *v.* S. S. Amerika, [1917] A. C. 38 — action for death; criticised in note by Donald E. Dunbar, Statutory Principles in the Common Law, 30 Harv. L. Rev. 742 (1917).

[3] The statement of facts is condensed, and the concurring opinion of Warrington, J., is omitted, as well as the detailed discussion of American cases in the other opinions.

in order. In pretended performance of this contract Knight, Yancey and Company forged a through bill of lading running to shippers' order, and attached it to a draft drawn by themselves for the contract price upon the Bank of Liverpool, worded: "Sixty days after sight this first of exchange (second unpaid) pay to the order of ourselves Fourteen hundred and sixty four pounds and nine shillings value received, and charge same to account of $\frac{100}{\text{R.S.M.I.}}$ bales of cotton." The draft also contained, in the margin, the date of the sale contract and a reference to the quality of the cotton. The letters R.S.M.I. purported to be the marks upon the bales. The draft and bill of lading were duly indorsed and sold in New York to the Guaranty Trust Company, an exchange house. The trust company presented the bill in England to the drawee bank, which accepted under instructions from the buyers after inspection by them of the shipping documents, which were detached and retained by the acceptor. The trust company sold the accepted bill. Some suspicions were afterwards aroused as to the genuineness of the bill of lading, but the acceptor felt itself obliged, against the instructions of the buyer, to pay the ultimate holder of the draft at maturity, and debited the buyers' account with the amount. The buyers, on discovering the forgery, sued the Guaranty Trust Company in the United States Circuit Court to recover the amount paid. A demurrer to the complaint was overruled, Noyes, J., holding that the draft was conditional.[1] On appeal a new trial of the action was ordered upon the ground that the case ought to have been decided by English law, and that the judge had disregarded the evidence before him that by English law the draft was unconditional.[2] The Guaranty Trust Company thereupon began a new action against the buyers in England to obtain a declaration that there was no liability to the buyers. They counterclaimed for the amount of the bill, and pleaded that the plaintiffs warranted and represented the genuineness of the bill of lading; that they undertook to indemnify the plaintiffs against loss; that there had been a failure of consideration and mutual mistake; and that the action fell to be decided by American law. Bailhache, J., held that the question whether the draft was conditional was governed by American law, that it was conditional, and that the plaintiffs were liable.[3] The plaintiffs appeal.

PICKFORD, L. J. . . . The first question is whether the defendants can recover this money assuming the case to be governed by English law. I agree with Bailhache J. that the document was by English law a bill of exchange and negotiable, and that neither the draft nor the acceptance was conditional according to our law. . . .

[1] 187 Fed. 686 (C. C. S. D. N. Y. 1911).
[2] 210 Fed. 810 (C. C. A. 2d, 1913).
[3] [1918] K. B. 43.

So far as warranty, representation, and undertaking to indemnify are concerned, the case is governed by Leather *v.* Simpson, L. R. 11 Eq. 398, and Baxter *v.* Chapman, 29 L. T. R. 642. . . . The object of handing over the bill of lading or attaching it to the draft was to enable the plaintiffs to hand it to the bank on acceptance and also to give the plaintiffs a security in case of a refusal to accept. The plaintiffs, however, to use the words of Bailhache J., [1918] 1 K. B. 51, bought the exchange, not the cotton, and they acquired no property in the bill of lading or the goods represented by it except so far as was necessary to secure them during the period between the purchase of the draft and its acceptance. On acceptance their interest in the bill of lading ceased to exist, and the special property which they had in it was not transferred to the bank but extinguished. The property in the cotton and the right to the bill of lading then passed to the bank or the defendants, not by reason of any contract between the plaintiffs and the bank or the defendants, but by reason of the original contract of sale between Knight, Yancey & Co. and the defendants, the bank's principals. I doubt if the presentation of the draft for acceptance was a request by the plaintiffs to the bank at all; it may well be only an inquiry as to whether they were going to perform the contract of their principals with Knight, Yancey & Co. by accepting the draft. The position of the holder of a bill of exchange who presents it for payment is, I think, well expressed in a lecture by Dean Ames, of Harvard, in the *Harvard Law Review*, vol. 4, pp. 297, 302, republished in Ames' Lectures on Legal History, p. 270, where he says: "The attitude of the holder of a bill who presents it for payment is altogether different from that of a vendor. The holder is not a bargainor. By presentment for payment he does not assert, expressly or by implication, that the bill is his or that it is genuine. He, in effect says: 'Here is a bill, which has come to me, calling by its tenor for payment by you. I accordingly present it to you for payment, that I may either get the money, or protest it for non-payment.'" . . . He is no doubt in that passage speaking of the question of whether there is a representation as to the genuineness of the bill of exchange, but I think the statement as to the position of the holder in such a case applies equally to the question whether there is a representation as to the bill of lading. But if it were a request, it was only a request to them to perform that contract, and such a request did not impose any liability upon the plaintiffs.[1] . . .

There remains, however, the question of how far the case is affected by American law. If the document be an unconditional order and acceptance and so a negotiable instrument, it is not contended that American law applies to the case, and indeed such a contention would

[1] Failure of consideration and mistake were also held not to be grounds for recovery.

be useless, since American law in that case is the same as our own: see Springs *v.* Hanover National Bank, (1913) 209 N. Y. 224, and the cases there cited. But it is contended by the defendants that the meaning of the draft must be ascertained according to American law because it was issued in America, and that when its meaning has been so ascertained it is shown to be only a conditional order and therefore not a negotiable instrument. . . . I will assume without deciding that the question whether the draft is conditional is to be answered according to American law. . . .

In considering the matter it is, I think, necessary to keep quite distinct two questions: (1.) Was the drawee entitled as a condition of his acceptance to possession of the bills of lading with or without a warranty as to their genuineness? (2.) Was the draft which he accepted an order dependent for its fulfilment upon a condition? I do not think these two questions have been kept sufficiently distinct by some of the witnesses, or in some of the arguments and cases. It is quite probable that by virtue of the contract between the drawer and drawee (who were vendor and purchaser) it was a condition of acceptance that the bills of lading should be handed over, and yet that the order to pay contained in the draft and accepted by the drawee should be unconditional. This point has to be determined according to the conditional or unconditional nature of the draft alone. Some difficulty is occasioned in the consideration of this question by the uncertainty in which the matter is left as to the nature of the condition which is said to be contained in the draft. The only condition mentioned in the Bills of Exchange Act, 1882,[1] or the Negotiable Instruments Law of Alabama or New York is a condition that the amount ordered to be paid should be paid out of a particular fund. [N. I. L. §§ 126 and 3 were quoted.] So with a slight variation in language the law of the two States is the same and is the same as the English law. This definition of a conditional order is, of course, not exhaustive, and there may be other conditions. This, however, is the one which is referred to in nearly all the American cases to which we were referred and is mentioned by Bailhache J. as if it were the one he was considering. The passage is as follows, [1918] 1 K. B. 54: "The defendants say that the draft sold to the plaintiffs and accepted by the defendants is not regarded in America as a negotiable instrument, but as a conditional order or assignment of a fund." In his final conclusion, Ibid. 62, he does not state the nature of the condition. Some of the witnesses called for the defendants were by no means certain of the condition which they said existed (Mr. Tompkins, pp. 33, 34, 35, of the evidence taken on commission in New York, and Mr. Conlen, p. 52). Noyes J., who decided that the draft was conditional, does not define the condition further than by saying that the draft was drawn against the cotton. This is an expression which I think, with respect, is some-

[1] § 3 (3).

what lacking in precision. It may mean that the draft is only to be paid out of the proceeds of the cotton; it may mean that there is an undertaking that the bill of lading is genuine; and it is often used to mean no more than that the draft is drawn to carry out a cotton transaction, and is not a finance or accommodation draft. I think an examination of the evidence in this case shows that the last was the meaning which the witnesses attached to these words. The expression is often used with this meaning by commercial men and also by judges: see Craig *v.* Sibbett, (1851) 15 Pa. 238, Brown, Shipley & Co. *v.* Kough, (1885) 29 Ch. D. 848, 855, Amsinck *v.* Rogers, (1907) 189 N. Y. 252, and other cases. I think that Noyes J. was using it in the first sense, but it does not appear clearly in his judgment. I fail to see how this first meaning can attach to a draft drawn as this was by a vendor on a purchaser to pay for cotton sold by the former to the latter, and for this purpose I do not think it makes any difference whether the draft is payable at sight or after a specified number of days. If the goods sold are not delivered but the money is paid at once, the matter is clearer, but if they are sold on credit for the number of days mentioned in the draft, it only establishes that the buyer hoped, and perhaps expected, to receive the goods and realize them, and so put himself in funds to pay the draft. It cannot mean that the draft is only to be paid out of the proceeds, for, if so, the vendor, and not the purchaser, is exposed to the risks of the market. If there were a heavy fall in the market, he would on this construction be paid, not the contract price of the cotton, but the amount realized after the fall in the market. This is altogether inconsistent with the transaction. The same considerations apply to a draft drawn for advances against cotton. Probably from these considerations the learned counsel for the respondents did not contend that the condition in this case was that the draft should be paid out of the proceeds of the cotton, but stated it as being a condition that the drawee should receive a genuine bill of lading and insurance certificate for cotton corresponding to the marks and description of the cotton mentioned in the draft. For the points I am now considering it is essential to remember that the question is whether the condition alleged is to be found in the words of the draft. It matters not whether in construing the draft regard is had to surrounding circumstances or not; the question is, whether in the draft itself there is this condition.

According to the contention of the defendants' counsel, the condition is to be found in the words "charge the same to account of $\frac{100}{\text{R.M.S.I.}}$ bales of cotton," and the mention of the sale date and quality of the cotton in the margin. This, they say, should be read as meaning, not "pay to the order of ourselves out of the proceeds of the cotton mentioned," this meaning they expressly disclaimed, but "pay to the order of ourselves provided that the bill of lading of the cotton mentioned herein is genuine and represents actual cotton"; and

this must be found in the terms of the draft itself, which, it may be noticed, does not mention the bill of lading at all. This makes the examination of the American law in this case rather difficult, for on examination I think it will be found that the witnesses directed their evidence to the question of the condition first mentioned, i.e., was the order to pay out of a particular fund or out of the drawee's assets with a right of recoupment, rather than to the condition for which the defendants now contend. It also appears, in my opinion, that with the exception of the very special acceptance in Guaranty Trust Co. of New York *v.* Grotrian, (1902) 114 Fed. Rep. 433, the decision in every American case cited to us dealt with the first mentioned condition. . . .

It seems that the American Courts take into account the surrounding circumstances outside the terms of the document itself more than the English Courts, but, in whichever way these cases are looked at, the current of authority is, in my opinion, in favour of the draft in this case being unconditional and contrary to the decision of Noyes J. . . .

In any event, therefore, I think that the defendants cannot recover. . . .

SCRUTTON, L. J. . . . The enormous volume of sales of produce by a vendor in one country to a purchaser in another has led to the creation of an equally great financial system intervening between vendor and purchaser, and designed to enable commercial transactions to be carried out with the greatest money convenience to both parties. The vendor, to help the finance of his business, desires to get his purchase price as soon as possible after he has despatched the goods to his purchaser; with this object he draws a bill of exchange for the price, attaches to the draft the documents of carriage and insurance of the goods sold and sometimes an invoice for the price, and discounts the bill — that is, sells the bill with documents attached to an exchange house. The vendor thus gets his money before the purchaser would, in ordinary course, pay; the exchange house duly presents the bill for acceptance, and has, until the bill is accepted, the security of a pledge of the documents attached and the goods they represent. The buyer on the other hand may not desire to pay the price till he has resold the goods. If the draft is drawn on him, the vendor or exchange house may not wish to part with the documents of title till the acceptance given by the purchaser is met at maturity. But if the purchaser can arrange that a bank of high standing shall accept the draft, the exchange house may be willing to part with the documents on receiving the acceptance of the bank. The exchange house will then have the promise of the bank to pay, which, if in the form of a bill of exchange, is negotiable, and can be discounted at once. The bank will have the documents of title as security for its liability on the acceptance, and the purchaser can make arrangements to sell and

deliver the goods. Before acceptance the documents of title are the security, and an unaccepted bill without documents attached is not readily negotiable. After acceptance the credit of the bank is the security, and an accepted bill with documents attached is unusual and not readily negotiable. It further appears from the evidence as to commercial usage on which the above statements are based that it is commercially convenient to have on the face of the bill an indication of the transaction in respect of which it is drawn. It is convenient for the exchange house to know that the documents of title relate to the transaction in respect of which the bill is drawn. It is convenient for the accepting bank and purchaser to be able to identify the bill as relating to a particular transaction, and to check the documents of title as relating to that transaction; and when the documents of title are detached from the bill, bills which on their face purport to be founded on commercial transactions, and to be "produce" or "commodity" bills, are more readily negotiable and realizable than bills which on their face show nothing, and may be "kites" or accommodation bills. It is very common, therefore, to find on the face of the bill a statement "pay . . . and charge same to the account of" certain specified commodities. A witness from the exchange house found that in 23,000 bills in a period of five years 93 per cent. bore on their face these or similar words referring to the commercial transaction giving rise to the bill. As Bowen L. J. said in Sanders *v.* Maclean, (1883) 11 Q. B. D. 327, 343, "the practice of merchants . . . is not based on the supposition of possible frauds," and the great business of financing produce sales generally goes through safely because most transactions are honest. But fraud occasionally happens and it gives rise to the present dispute. The vendors originally forged bills of lading, and afterwards shipped goods to correspond, so that the goods arrived before the bill of exchange became due. They thus anticipated the time when they could honestly obtain the price, but in fact delivered the goods. But a crisis came when they forged the bills of lading, but did not ship the goods and became insolvent. The question would then arise who was to bear the loss, the exchange house who had presented for acceptance a bill of exchange with forged documents attached, or the accepting bank who had incurred a liability on their acceptance, or the purchaser, the bank's principal, if he had to indemnify them on that liability. . . .

By the English Bills of Exchange Act, an unqualified order to pay, coupled with either an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount or a statement of the transaction which gives rise to the bill, is unconditional. These words seem expressly to cover the case where a produce bill is shown to be such by an identification on its face of the transaction giving rise to it, and I did not understand it to be argued that by English law a bill in

this form was other than an unconditional promise to pay. But it was said that by the law of the United States it was. . . . We have one conclusive piece of evidence, the language of the Negotiable Intruments Law of New York, and [§ 3] as to payment out of a fund is practically identical with the language of the English statute. . . .

No American case was cited to us where such a condition as contended for in this case, as to genuineness of documents, had been established.

I have come, therefore, to the conclusion that both by English and American law this draft was an unconditional order to pay. . . . On the commercial position, it seems to me to be a question of the haggling of the market whether English buyers and banks can secure a term in the contract of purchase that acceptances with documents attached, when presented by persons other than the vendor, shall be guaranteed as genuine by those presenting them, or whether they will continue to rely on the fact that commercial transactions are generally honest. . . .

Appeal allowed.[1]

JORDAN MARSH CO. *v.* NATIONAL SHAWMUT BANK.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1909.

201 Mass. 397.

KNOWLTON, C. J.[2] These are seven actions, brought against seven corporations doing a banking business in the city of Boston. In each of these banks or banking companies the plaintiff was a depositor. The actions are all of the same character, and the opinion in the first of them will be equally applicable to all the others. The declaration contains two counts, one for money had and received, to recover the balance of the plaintiff's deposit after a demand, and the other setting forth the contract between the plaintiff and the defendant, and that the plaintiff made sundry checks, payable in part to the order of fictitious or non-existing persons, which fact as to these persons was not known to the plaintiff, and in part to the order of one A. L. Sefton, and that the defendant paid these checks upon forged indorsements of the names of the payees. The

[1] The authorities, including the American cases discussed by the Court, are collected in 32 Harv. L. Rev. 560 (1919); see also 18 Colum. L. Rev. 480 (1918).

In Guaranty Trust Co. *v.* Grotrian, 114 Fed. 433 (C.C. A. 2d, 1902), a draft reading "charge the same to account of 8417 bush. flax seed" was accepted "payable at Lloyds Bank . . . against indorsed bills of lading for 8417 bushels of flax seed per Buffalo s.s." The attached bills of lading for the flax seed were forged. *Held*, the acceptor can recover the money paid, the acceptance being conditional. See 32 Harv. L. Rev. 564, note 18.

[2] The statement of facts is omitted.

cases were submitted to the Superior Court upon the report of an auditor who found for the defendants. The judge found *pro forma* for the defendants, and reported the cases to this court.

It appears by the auditor's report that the plaintiff was conducting a very large business in selling goods in a department store. In the store there were about eighty separate departments, each in charge of an employee known as a buyer. There was in the store an elaborate system for buying, receiving, checking off, registering and inventorying all goods brought to the store for sale, and for dealing with the bills for these goods and authorizing payment for them, and for making and transmitting checks to vendors. There were certain variations from the usual method of dealing with bills and checks when a buyer was in a hurry to get the goods upon the shelves for sale, or when a large discount could be obtained from a bill by immediate payment of it, or when a bill was presented by a seller in person who was eager to be paid at once. One of the plaintiff's employees, who was hired as a checker of the goods received, devised a scheme of fraud, whereby, with the assistance of a confederate for a time, he was able to obtain the plaintiff's checks in payment of fictitous bills for goods supposed to have been bought by heads of departments and received at the store. Many of these checks were drawn on the defendant bank, and were paid by the defendant through the clearing house. The defendant did not verify nor attempt to verify the signatures of the payees on the checks, but the checks were examined to see that the signature of the plaintiff was genuine, that there was nothing irregular or suspicious on their face, that they were indorsed with the payee's name, and that they bore the indorsement of the bank sending them through the clearing house. On the checks, or on most of them, were stamped the words, "Endorsement guaranteed. Pay only through the Boston Clearing House. The Commercial National Bank of Boston, B. B. Perkins, Cashier." The payments were made by the defendant from moneys belonging to the plaintiff. The auditor found "that there was no actual negligence on the part of either of the defendant banks or trust companies in paying the checks." "If negligence of any kind can be imputed to them," he says, "it was constructive negligence, and not the result of their doing or failing to do anything which could reasonably be expected of them." This finding, in connection with the facts stated in the report on which it is founded, is erroneous in law. The implied contract between the banker and his depositor in regard to the depositor's checks is that the banker will pay them from his deposit to the persons to whom he orders payment to be made. When a definite order is made in the check, the duty of the banker is absolute, as a general rule, to pay only in accordance with the order. If payment is to be made to the order of a person named in the check, and if he orders the payment to be made to another person, it is the duty of the

banker to see that the signature of the payee is genuine. . . . This rule of law applies as well to payments made by a banker through the clearing house as to payments made over the counter. The duty is the same and the performance of it is as important in one case as in the other. If the methods of the clearing house are a convenience to bankers in the transaction of their business, and the bank on which a check is drawn chooses to pay on a guaranty of the indorsement of the payee's name by another responsible bank, this does not affect the duty of the paying bank to its depositor. It simply indicates a willingness of the bank to disregard and neglect the duty, upon the guaranty of a responsible party that the duty has already been perfectly performed for it by a preceding party from whom the check has been received. . . .

The auditor has found that the plaintiff, in the method of doing its business and in the conduct of its officers and employees, was negligent in not discovering and preventing the fraud by which it was induced to draw checks payable to fictitious persons, and to another person who was not entitled to payments. The auditor has also found that this negligence induced the defendant to pay these checks. The facts are pretty fully stated in the report, and the question arises whether there was any evidence of negligence which was a direct and proximate cause of the payment of these checks upon forged indorsements, or whether the negligence only produced conditions which were followed by criminal acts of forgery by a third person, which acts were not discovered by the defendant through its failure to make investigation as to the pretended indorsements by the payees. Assuming that, under some circumstances, negligence of a depositor inducing an unauthorized payment of a check by a banker may be availed of in defense of a claim by the depositor for the money paid, it seems plain that only negligence which is a direct and proximate cause of the payment can be effectual in making such a defense. Some of these checks were made payable to A. L. Sefton, a woman, and were indorsed by her. We think it plain that these were not payable to a fictitious person, and that the payments were rightly made. Other checks were in the same form and were not indorsed by her. Assuming for the moment that these were not payable to a fictitious person, they were paid on forged indorsements.[1] . . .

The question arises whether the making of a check payable to a fictitious or non-existing person, through negligent failure to discover the fraud by which the check is obtained, stands differently from making a check to an actual person, in reference to its effect upon payment by the defendant. We are of opinion that there is no difference in law. In either case it is the duty of the bank to see that there is a genuine indorsement. In some respects it would be more difficult to deceive a bank in this particular, as

[1] The defendants were declared liable on these checks.

against vigilant investigation, if the payee was fictitious than if he were real. In some respects it might be less difficult. We know of no decision that has recognized a difference in law between the two cases. It has been held that there is no difference. Armstrong *v.* National Bank, 46 Ohio St. 512.

The defendant relies upon Bank of England *v.* Vagliano Brothers, [1891] A. C. 107. This case was peculiar in its facts. The Queen's Bench Division (Vagliano Brothers *v.* Bank of England, 22 Q. B. D. 103) and the Court of Appeals (23 Q. B. D. 243) both decided in favor of the plaintiffs. The law lords, on appeal, were divided in opinion, a majority of them holding that the bills of exchange were payable to a fictitious or non-existing person, and so payable to bearer under the English statute. Two of them thought that the decision should be for the plaintiffs. Four were of opinion that the conduct of the plaintiffs precluded them from recovery.

It is to be noticed, first, that the instruments in question were not bank checks, but were in the form of drafts or bills of exchange purporting to be drawn on the plaintiffs by a firm in Greece in favor of a firm in Constantinople. The plaintiffs accepted them, and sent a special letter of advice to the defendant requesting that they be paid at maturity. Some of the law lords were of opinion that the representations of the plaintiffs and the circumstances attending the transaction relieved the defendant of any duty to verify the signature of the payee. Indeed, it was assumed by them that, under the circumstances, the defendant bank was not expected by the plaintiffs to delay the payment until it could send to Constantinople and ascertain whether the signature of the payee was genuine. The decision of the case was made to rest very largely upon the English negotiable instruments act, which makes a negotiable instrument payable to a fictitious or non-existing person payable to bearer, even though the maker is ignorant of the fact that the payee is fictitious, while, under our statute, as at the common law, an instrument so made is not payable to bearer unless the maker knows that the person named as payee is fictitious or non-existing. [N. I. L. § 9–3.] This case does not require us to change the rule of law applicable to the payment of checks of a depositor by a banker.

We are of opinion that, in the facts stated by the auditor, there was no evidence of negligence that relieved the defendant of its duty to pay only to a person authorized to receive the money, under the language of the check.

The case of Shipman *v.* Bank of New York, 126 N. Y. 318, is almost identical in its leading features with the case before us, and the decision of it fully covers the conclusion which we have reached.

There is a dispute between the parties as to whether the checks payable to A. L. Sefton, on which her signature was forged, were payable to a fictitious or non-existing person, within the meaning

of the statute. Perhaps this question is not very important; for in either view the payments were obtained on forged indorsements, and it is immaterial to the rights of the parties whether the forgeries were of the name of a real person or of a fictitious person. Armstrong *v.* National Bank, 46 Ohio St. 512. The checks were all made upon a representation to the person drawing them that there was a person, whose name was given, to whom the plaintiff owed the sum stated. The drawer of the check intended that it should be payable only to the person named in it. If the person named was a real person whose name was given to designate her, then the fraud was not in reference to the existence of the person, or as to her being intended by the name written in the check, but as to the statement that a payment was due her. The check would, therefore, be according to the truth in reference to the person intended, and would be a fraud upon the maker only in reference to the alleged indebtedness. If there was no such person as the one named, the check would be false through a fraud upon the maker in both particulars, and the check would not be payable to the person named, because there was no such person. The result would be the same if a name was chosen which was not intended to represent any person, even though it was known that there was a person to whom the name belonged. The name so used would be none the less fictitious that it was a real name of a person not intended to be designated.

The auditor found that the name A. L. Sefton upon checks which she had not indorsed was that of a fictitous person. The report does not state the facts and evidence sufficiently to show whether this finding was right or not. It depends upon whether the name given by the person who suggested it, and whose suggestion was followed by the drawer of the check, was used as designating the person to whom the name belonged, or as a mere name, without reference to its belonging to any person, and with an intention that it should not designate any particular person. Rowe *v.* Putnam, 131 Mass. 281.

It is fairly to be presumed, from the general statement of the business done between the parties, that the defendant periodically returned checks to the plaintiff with an account stated. It was the duty of the plaintiff, if such accounts were rendered, to examine them reasonably, to see whether they were correct. This duty, as between banker and depositor, is generally recognized. Dana *v.* National Bank of the Republic, 132 Mass. 156. Leather Manufacturers' Bank *v.* Morgan, 117 U. S. 96. It has been held, in cases where the depositor failed to make such an examination within a reasonable time, that he was estopped from claiming moneys erroneously paid out which were stated in the account, at least so far as his omission to examine caused damage to the banker through his consequent failure to avail himself of means

of reimbursement. Critten *v.* Chemical National Bank, 171 N. Y. 219. Janin *v.* London & San Francisco Bank, 92 Cal. 14. This defense is not set up in the answer in this case, nor referred to in the report. It is very generally, if not universally, held that this duty of the depositor does not extend to an examination of the signatures of the payees of the checks, for he is not expected to know them, and the banker is expected to see that the payments are properly made. Murphy *v.* Metropolitan National Bank, 191 Mass. 159, and cases cited. Shipman *v.* Bank of New York, 126 N. Y. 318. Welsh *v.* German American Bank, 73 N. Y. 424. Harter *v.* Mechanics National Bank, 34 Vroom, 578. German Savings Bank *v.* Citizens National Bank, 101 Iowa, 530. United Security Ins. & Trust Co. *v.* Central National Bank, 185 Penn. St. 586.

New trial ordered.[1]

PHILLIPS *v.* MERCANTILE NATIONAL BANK.

COURT OF APPEALS, NEW YORK. 1894.

140 N. Y. 556.

GRAY, J.[2] The plaintiff is the receiver of the National Bank of Sumter, in South Carolina, and through this action seeks to recover a balance alleged to be due on a deposit account with the defendant bank. The question presented by the record is whether certain twelve checks, drawn by the cashier of the Sumter bank, which were paid by the defendant bank, could properly be debited in account to the Sumter bank. Bartlett, its cashier, had drawn them upon the defendant for various amounts; some to the order of A. S. Brown and some to the order of C. E. Stubbs. In the check book he would enter sometimes the real amount of the checks and sometimes an amount much less than the checks actually were drawn for. The names of these payees were those of persons who actually resided in Sumter and were dealers with the bank; but they knew nothing of these checks and had no connection whatever with the transactions of the cashier in issuing these checks. Bartlett, after having drawn the checks, indorsed them in the name of the payee; making them payable to the order of some firm of stock brokers in New York, who collected them from the defendant. By subsequent manipulations of the books of his bank, Bartlett was able to prevent a discovery of his dishonest acts, until after he had absconded and the insolvency

[1] National Surety Co. *v.* National City Bank, 172 N. Y. Supp. 413 (1918, N. I. L.), *accord.*

[2] N. Y. Revised Statutes, 1889, IV, 2499, § 5 provided: "Such notes, made payable to the order of the maker thereof, or to the order of a fictitious person, shall, if negotiated by the maker, have the same effect, and be of the same validity, as against the maker and all persons having knowledge of the facts, as if payable to bearer."

of the bank was disclosed. The learned trial judge, in dismissing the complaint, discussed the question of what the act of the cashier of the Sumter bank amounted to in law. In his judgment, the cashier's indorsement of the checks in the name of the payee, which he had written in the body of the check, was not, in a legal sense, forgery. He said that act did not defraud the persons whose names; were used as payees, nor the bank in New York, nor his own bank; but that the fraud consisted in the unlawful drawing of the check for his own purposes, with the intent to convert his own bank's funds. Regarding the transaction in that light, and the indorsement as a part of one continuous act of preparing the check so that the New York bank should pay the funds drawn upon to the indorsees, he very properly reached the conclusion that, so far as the New York bank was concerned, the cashier's intent was the intent of his bank and, hence, the payment of the checks was conclusive upon it.

At the General Term, the opinion of the court again carefully reviews the legal questions and sustains the judgment below. Upon the question of the effect upon the transaction of the use by Bartlett of names, as payees, of persons who were customers of the bank, it is said in the opinion that that fact did not prevent the application of the principle which would govern, if fictitious names had been selected and used for payees. They held, in substance, that the bank, through its authorized officer, had put in circulation paper, with knowledge chargeable to it that the names of the payees did not represent real persons, and with the intention to indorse thereon the names of the payees; who, for all intents and purposes, were fictitious payees, and whose names were adopted and resorted to as a device to avoid suspicion.

We think the judgments below were right. Whether indorsing the check in the name of the payee therein was a forgery in the legal sense, or not, is not the important question. In a general sense, of course, the cashier did forge the payee's name, but that fact did not affect the title or rights of the defendant. (Coggill *v.* American Exchange Bank, 1 N. Y. 113.) In the case cited, a bill was drawn upon the plaintiff to the order of one Truman Billings and was discounted at a bank. The drawer had indorsed it with the name of the payee, Truman Billings; a person who in fact had no interest in the bill. It was held that the defendant in the case, who had accepted and paid the bill, held it by a good title. BRONSON, J., said: "As the payee had no interest and it was not intended that he should ever become a party to the transaction, he may be regarded, in relation to this matter, as a nonentity, and it is fully settled that when a man draws and puts into circulation a bill, which is payable to a fictitious person, the holder may declare and recover upon it as a bill payable to bearer. In legal effect, though not in form, the bill is payable to bearer."

The case of Shipman *v.* Bank of the State of New York (126 N. Y. 318), which was recently before us, did not decide any question inconsistently with what the courts below have decided. There it had been found that the checks were signed by the firm, in the belief that the names of the payees represented real persons entitled to receive the amounts of the checks, and with the intention that they should be delivered to real payees and should not go into circulation otherwise than through a delivery to and an indorsement by the payees named. Bedell was their clerk, whose employment did not comprehend the drawing or indorsing of checks or drafts; and, in indorsing upon the checks the names of the payees, he committed the crime of forgery, because he was without authority in that respect and did so with the intention to deceive his employers, the makers, and to put their checks in circulation for his account. That was a case wholly other than was made out here. It was stated in the Shipman case that the maker's intention is the controlling consideration, which determines the character of the paper, and that the statutory rule, which gives to paper drawn payable to the order of a fictitious person, and negotiated by the maker, the same validity as paper payable to bearer, applies only when such paper is put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The principle of that decision is quite applicable to the case at bar. Though Bartlett selected, for the execution of his dishonest purposes, the names of persons who were dealers with his bank, it was, in legal effect, as though he had selected any names at random. The difference is that, by the methods resorted to, he averted suspicion on the part of the directors or other officers of his bank. The names he used were, for his purposes, fictitious, because he never intended that the paper should reach the persons whose names were upon them. The transaction was one solely for the fraudulent purpose of appropriating his bank's moneys, by a trick which his position enabled him to perform. Concededly, if the names of the payees were of fictitious persons, the Sumter bank would have had no claim upon the defendant; how, then, can the transaction be said to assume a different aspect because the names adopted were of known persons? That the intention was to treat them as being of fictitious persons is manifest. As cashier, invested with the authority to draw checks upon the bank's accounts with its correspondents, instead of drawing them directly to the order of the parties, who he intended should get the moneys, he drew them to the order of persons who had no interest in them, and thereupon wrote their names under a direction to pay to the real parties, who were intended to be the recipients of the funds drawn upon. If the checks had been drawn directly to the order of the real parties, the defendant would undoubtedly have been protected in paying them. As it was, the payees were fictitious persons in the eye of the law, and the only real parties were the firms

in New York, to whom the cashier sent them in such form as that they could draw the moneys upon them.

The fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existent person, but upon the intention underlying the act of the maker in inserting the name. Where, as in this case, the intent of the act was, by the use of the names of some known persons, to throw directors and officers off their guard, such a use of names was merely an instrumentality or a means which the cashier adopted, in the execution of his purpose to defraud the bank, in an apparently legitimate exercise of his authority. The cashier, through his office and the powers confided to him for exercise, was enabled to perpetrate a fraud upon his bank, which a greater vigilance of its officers might have earlier discovered, if it might not have prevented. If his position and the confidence reposed in him were such as to enable him to escape detection for the while, then the consequences of his fraudulent acts should fall upon the bank, whose directors, by their misplaced confidence and gift of powers, made them possible, and not upon others who, themselves acting innocently and in good faith, were warranted in believing the transaction to have been one coming within the cashier's powers.

It may be quite true that the cashier was not the agent of the bank to commit a forgery, or any other fraud of such a nature; but he was authorized to draw or check upon the bank's funds. If he abused his authority and robbed his bank, it must suffer the loss. The distinction between such a case and the many other cases, which the plaintiff's counsel cites from, is in the fact that it was within the scope of this cashier's powers to bind the bank by his checks. In transmitting them, made out and indorsed as they were, the bank was so far concluded by his acts as to be estopped from now denying their validity.

For the reasons given, the judgment should be affirmed, with costs.[1]

TOLMAN *v.* AMERICAN NATIONAL BANK.

SUPREME COURT, RHODE ISLAND. 1901.

22 R. I. 462.

STINESS, C. J. The plaintiff sues to recover money paid out by the defendant, on his account, upon his check, under a forged indorsement. Louis Potter, representing himself to be Ernest A. Haskell, went to the plaintiff to get a loan of money, giving the residence and occupation of Haskell as his own. The plaintiff

[1] Snyder *v.* Corn Exchange National Bank, 221 Pa. 599 (1908) *accord*, under N. I. L. § 9-3.

made inquiry, and finding that Haskell was employed and was living as represented, he agreed to make the loan.

Potter, under the name of Haskell, gave his note to the plaintiff, and the plaintiff gave him a check on the defendant payable to the order of Haskell, delivering it to Potter, supposing him to be Haskell.

Potter indorsed Haskell's name on the back of the check and gave it to A. R. Himes, who collected it from the bank. When the note given to the plaintiff became due, the fraud was discovered; he thereupon notified the bank and demanded a return of the amount paid on the check to the credit of his account.

At the trial a verdict for the defendant was directed, and the plaintiff petitions for a new trial.

The question is whether the bank is liable for the payment which it made on this check.

It is a fundamental rule of banking that, when a bank receives money to be checked out by a depositor, it is to be paid only as the depositor shall order. The bank assumes this duty in receiving the deposit. If, therefore, it pays out money otherwise than according to such order, it is liable to the depositor for the amount so paid. The bank thus assumes the responsibility of seeing that the money gets to the party authorized to receive it. Hence, if it pays money out on a forged signature, the depositor being free from blame or negligence, it must bear the loss. In this case the plaintiff directed the money to be paid to the order of Ernest A. Haskell. It was not so paid. He did not indorse the check. Potter forged his signature. Under these circumstances the plaintiff's right to recover seems to be plain.

But the defendant contends that the man who made the contract received the check; that it was intended for him; that the money went to him, and so there was no forgery and the bank is not liable.

It would seem that upon so plain a proposition the decisions should be unanimous; but it is not so. To say that the money was intended for the one who had committed the fraud is simply to say that the fraud was complete. It is a surprising doctrine that, if A. can successfully personate B., he thereby escapes being guilty of forgery in signing B.'s name on a check of C.'s. Of course, C. intended the money to go to him, as an actual person, but only because he supposed that he was the person whom he represented himself to be. Can the imposition upon C. justify A.'s personation and signature of B.? If C. had sent his check to B. by A., and the latter had written B.'s indorsement thereon, no one would say that it was not forgery. How does it change the case when A. gets the check by making C. believe that he is B.? In one case C. sent it to B., and in the other he supposed that he handed it to B. directly. In both cases it was intended for B.

The plaintiff's counsel has well said, in this case, that any decision to the effect that a bank is protected in paying a check to an

impostor who has forged the payee's name on the check, upon the ground that it carries out the actual intent of the drawer, is based upon a manifest fallacy.

Moreover, of what consequence is the intent of the drawer of the check, when the direction is to pay to the party named? He has the right to assume that the bank will pay to the party as directed. In this case the money was intended for Haskell, because his was the only name suggested; he had been looked up and found to be responsible. It is a perversion of words to say that it was intended for Potter, simply because he had fraudulently impersonated Haskell and led the plaintiff to believe that he was Haskell. The plaintiff did not intend to let Potter have money; his check showed he was not to have it, because it was made payable to Haskell. When, therefore, Potter fraudulently indorsed Haskell's name on the check, it was a typical case of forgery. It was a false signature with intent to deceive.

The defendant relies on Robertson *v.* Coleman, 141 Mass. 231, where the suit was by a holder against the maker of a check. The payee had assumed the name of another and obtained the check as the price for stolen property sold by the defendants as auctioneers. The decision was for the plaintiff, and good ground is given for it in the opinion, in this: that the plaintiff was a *bona fide* holder without notice, and that the defendants simply supposed the payee to be Charles Barney, of Swanzey, but not from any false representation made to them. Had the opinion stopped there, no case of fraud would have appeared. But the court put these facts aside as immaterial, and then said, "This was the person intended by the defendants as the payee of the check, designated by the name he was called in the transaction, and his indorsement of it was the indorsement of the payee of the check by that name. The contract of the defendants was to pay the amount of the check to this person or his order, and he has ordered it paid to the plaintiff." No authorities are cited in the opinion, but the case has been cited as an authority since. See Emporia Bank *v.* Shotwell, 35 Kan. 360; United States *v.* National Bank, 45 Fed. 163; Land Title Co. *v.* Northwestern Bank, [196 Pa. St. 230]; First National Bank *v.* Am. Exchange Bank, 49 N. Y. S. C. Ap. Div. 349.[1]

These cases lose sight of the distinction between real and fictitious persons. In the latter case there is nobody to inquire about; no one, in fact, misrepresented; no one in the mind of one party other than the person with whom he is dealing. In the case of a real person, however, one party, having him in mind, satisfies himself about the responsibility of such party and supposes that he is dealing, not with the person who is in fact before him, but with the one whom he has in mind and whom the one before him falsely personates. Thus in Mead *v.* Young, 4 D. & E. 28, it was held

[1] Affirmed, 170 N. Y. 88. See 14 Harv. L. Rev. 60.

that where a bill of exchange got into the hands of one of the same name as the payee, yet, such person, knowing that he was not the person in whose favor it was drawn, was guilty of forgery in indorsing it. . . .

The attention of counsel was called to the negotiable instruments act [§ 23], which is:

"Where a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative; and no right to retain the instrument or to give a discharge therefor, or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up forgery or want of authority."

This statute covers this case. We have referred to authorities because the defendant's counsel so earnestly and ably argued that the act did not alter the law-merchant that it seemed proper to show that the law in this respect, outside of the act, is in a very unsatisfactory state and that the act is right. We do not think that the act does alter the law as it was when, a few years ago, it seems to have been switched off on a fallacy in some places. One of the advantages of the act is in settling the question. Waiving the question of forgery, about which the cases we have cited differ, the signature in this case is clearly one "made without the authority of the person whose signature it purports to be," and, therefore, it is "wholly inoperative." This being so, the defendant cannot justify its action under it, there being no evidence of any conduct by the plaintiff to mislead the defendant and so to estop his present claim. As the case stood, the plaintiff had ordered money paid to Haskell. The bank had not so paid it. The fact that the plaintiff had been imposed upon did not relieve the bank from its duty to see that the money was paid according to order. The case should have gone to the jury.

New trial granted[1]

EMPIRE TRUST CO. *v.* MANHATTAN CO.

SUPREME COURT, APPELLATE TERM, NEW YORK. 1916.

97 N. Y. Misc. 694.

LEHMAN, J. The plaintiff has brought an action to recover from the defendant the amount of a check drawn by the firm of Homans & Co. upon their account in the defendant bank and certified by it. It appears undisputed that on the 16th day of March, 1916, the stock brokerage firm of Homans & Co. drew its check

[1] For the law as to chattels, see Cundy *v.* Lindsay, L. R. 3 A. C. 459 (1878); Williston on Sales, § 635.

for the sum of $1,990 to the order of the plaintiff and gave the check to one of their clerks with instructions to take the check to the defendant bank for certification and, after certification, to use the check for the purchase of $2,000 par value of revenue stamps from the plaintiff, which maintained a department for the sale of such stamps. The clerk handed the check at the defendant bank to the person whose duty it was to certify checks and after waiting some time inquired for his check. It then appeared that the check, after certification, had been taken by, or erroneously handed to, a third party. The clerk from the brokerage firm hurried over to the plaintiff's place of business, but the person who had wrongfully taken the check from the defendant bank had already used the check for the purchase of revenue stamps from the plaintiff. In order to obtain such stamps the purchaser was obliged to sign a requisition and, in the present case, the party presenting the check of Homans & Co. to the plaintiff had also delivered to the plaintiff a forged requisition for the stamps which purported to be signed by Homans & Co. At the close of the case the trial justice submitted to the jury only the question of whether the plaintiff in accepting the check acted in good faith or in bad faith, and reserved decision, upon the defendant's motion to dismiss the complaint, until the coming in of the special verdict. The jury found that the plaintiff had acted in bad faith. Thereafter the trial justice dismissed the complaint and, in his opinion, which is part of the record, indicated that he had reached this decision not only because he felt that the verdict of the jury on the question of fact was justified, but also because he found, as a matter of law, "that the check has never been duly negotiated and that the plaintiff is not a holder thereof in due course."

I have serious doubts whether the jury could reasonably find that the plaintiff was guilty of bad faith. The plaintiff was probably not vigilant when it accepted the check and forged requisition; possibly it may even have been, in a sense, grossly negligent, but there is grave question whether the negligence is sufficient to indicate actual bad faith. However, I do not think that we need consider that question for, in my opinion, even though the plaintiff accepted the check in good faith, it cannot recover.

The check made by Homans & Co. was never delivered by them to the payee, and until delivery an instrument has no legal inception. It was stolen from their possession. The thief never had any title to the check and, therefore, could not transfer title to the plaintiff. If the plaintiff can maintain an action upon an instrument which was never delivered by the maker, and by virtue of a title received from a person who himself had no title to the instrument, then this result must be due to the peculiar rules of the law merchant governing negotiable instruments, now embodied in the Negotiable Instruments Law. Section [16] of that law provides:

"Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved."

There is no doubt that by virtue of the rule embodied in that section the rule of law governing ordinary contracts or instruments, that a contract becomes effectual only by actual delivery, is modified at least to the extent that where a negotiable instrument is in the hands of a "holder in due course" a valid delivery thereof by all parties prior to him, so as to make them liable to him, is *conclusively* presumed. The real question in this case is, therefore, whether the plaintiff is "a holder in due course" within the meaning of that section.

The defendant claims that the payee is an "immediate party" to the instrument and that, therefore, in an action brought by the payee, evidence is always admissible to show that there was no valid delivery of the instrument. There seems to be some diversity of authority in the various states as to whether the payee of a negotiable instrument can ever be a "holder in due course" within the meaning of the statute. See Boston Steel & Iron Co. *v.* Steuer, 183 Mass. 140; Liberty Trust Co. *v.* Tilton, 217 id. 462, which hold that a payee is not necessarily a remote party and may be a holder in due course.[1] See also Vander Ploeg *v.* Van Zuuk, 135 Iowa, 350; Long *v.* Shafer, 185 Mo. App. 641, which hold that a payee is an immediate party and cannot be a holder in due course and does not take free from any defenses which the maker could interpose if the instrument were non-negotiable. It is quite impossible to reconcile these decisions, but it seems to me that, even though we adopt the views expressed by the Massachusetts courts, the plaintiff has not established that *in this case* the payee is not an immediate party and is a holder in due course.

In the case of Boston Steel & Iron Co. *v.* Steuer, 183 Mass. 140, the facts were that the defendant, a married woman, delivered to her husband her check for $200 made payable to the plaintiff and

[1] Ex parte Goldberg, 1919 Ala. 356 (1914); Johnston *v.* Knipe, 260 Pa. St. 504 (1918), *accord*; see 13 L. R. A. (N. S.) 490 note; L. R. A. 1915 B, 144 note.

instructed her husband to apply it in payment of a debt which she personally owed to the plaintiff. The husband fraudulently delivered the check to the plaintiff to be used in payment of his own debt to the plaintiff. The court there held that the plaintiff, though the payee of the check and, therefore, not holding through indorsement, was yet a holder in due course. The court there stated: "The fact that the plaintiff is the payee of a negotiable security does not prevent him from becoming a *bona fide* purchaser of it at common law, with all the rights incident to a purchaser for value thereof without notice," and it cites various cases in the English courts and in the Supreme Court of the United States as authority for this statement. These cases establish the proposition, I think, that where the maker of a negotiable instrument delivers it to a third party with instructions not to deliver it over to the payee of the instrument, except on certain conditions, and the party to whom the maker has delivered it fraudulently disregards his instructions and delivers it to the payee for value, the payee becomes a purchaser of the instrument. In all these cases, however, there are really two transactions. The first transaction is one between the maker and the third party by which the third party obtains possession of the instrument. The next transaction arises between the third party and the payee by which the third party delivers the instrument to the payee for value. In other words, in these cases the maker has given to a third party an instrument and has authorized the third party to transfer title to the payee by delivery, when certain conditions of which the payee has no notice are fulfilled. The third party thereupon proceeds to sell the instrument to the payee who takes without notice of the conditions. The payee's transaction with the third party gives rise to no defense on the part of the maker; any defense which the maker might have would rise from the original transaction between the maker and the third party to which transaction the payee is a stranger, consequently where the payee purchases the instrument for value from the third party he should be entitled logically to the same protection which is afforded to any other purchaser of a negotiable instrument. There is, so far as I can see, no real difference between such a case and a case where the maker conditionally delivers a negotiable instrument to a payee and the payee sells it to an innocent purchaser and endorses the note to him. In both cases the maker has put into the hands of a party upon secret instructions or conditions an instrument which that party can put into circulation. In both cases the holder has transferred the note to another man in such a manner as to make the transferee the holder of the note and in neither case has the transferee had anything to do with the earlier transaction between the maker and the person to whom the maker delivered the note. There is little doubt that a payee who purchases the note under such circumstances comes within the protection afforded ordinarily to a pur-

chaser for value unless the Negotiable Instruments Law has changed the common law or law merchant. Even in the case of Vander Ploeg *v.* Van Zuuk, *supra*, the court stated: "The conclusion which we reach is perhaps different from what it would have been had the Negotiable Instruments Act not been passed." There are, however, two important points of difference between the case we have under consideration and all the other cases which have arisen either under the law merchant or the Negotiable Instruments Act. In the present case the maker never had any transactions with the party who attempted to transfer the note to this plaintiff. That party had merely stolen the note from the drawer or drawee. Moreover, that party never claimed to have the right to deliver the note to the payee except as agent for the maker in payment of stamps sold to the *maker*. The plaintiff sold these stamps to the person in possession of the check knowing that the check was entrusted to some person for the sole purpose of paying for stamps requisitioned by the maker of the check. In other words while it did not know that the check was in the hands of a thief, it did know that it was in the hands of a person who had no right to deliver this check except for the purpose of paying for stamps sold to the maker. The defense in this case is that the check was delivered by a person having no authority to make the check effective by delivery. That defense arises not from any transaction with the third party by which a limitation unknown to the payee was imposed upon the third party's right to deliver the check. It arises from the fact that the payee accepted the check because it believed that the thief had authority to use the check in payment of stamps sold and delivered to the maker. It never sold any stamps to the maker but was fooled by a forged requisition into the belief that the thief was buying and receiving the stamps for the maker. There was no delivery of the check because, in the transaction to which the plaintiff was a party, the plaintiff failed to sell and deliver the stamps to the maker although it was informed that the maker had authorized the delivery of the check only upon that condition. The payee in such a case is not a purchaser of the check nor a remote party either to the instrument or to the transaction but, on the contrary, its claim of title to the check rests upon a transfer of possession from one who at best appeared to have authority to deliver the check and make it a valid contract only for a consideration which the plaintiff has failed to deliver. I have found no case either at common law or under the statute which holds that the payee who receives the check under such circumstances is a "holder in due course," and I do not think that on principle he can derive any rights from such a transfer.

These views are somewhat strengthened by the opinion of the Supreme Court of Massachusetts in the case of Liberty Trust Co. *v.* Tilton, *supra*, upon which the plaintiff seems largely to rely. In that case the payee of the note sued an accommodation indorser

who signed the note in blank, upon the express condition that the maker should fill in the note and deliver it only after certain conditions were met. The court there held that the payee was a purchaser for value. In that case the court again reviewed the authorities on the point of whether the payee of a note could ever be a holder in due course and especially its earlier decision in Boston Steel & Iron Co. *v.* Steuer, *supra*. It stated that the effect of that decision was to hold that the words "immediate parties" as used in the Massachusetts Negotiable Instruments Law which is similar to our own statute, "did not necessarily include the payee. Hence 'immediate parties' in that connection excludes a party who is a holder in due course. In such case these words must be confined to parties who are 'immediate' to the conditions or limitations placed upon the delivery in the sense of knowing or being chargeable with notice of them. A payee who is a holder in due course is not an immediate party in the sense of that section. This result follows from holding that a payee may be a 'holder in due course' as defined in section [52], because he could become such holder only on condition. '4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument.' Thus he could not be such holder unless the paper was 'negotiated' to him. Therefore the word 'negotiated' was held to describe the means by which a payee might acquire a note. It was given its common legal significance of concluded by bargain or agreement. Palmer *v.* Ferry, 6 Gray, 420, 423; Everson *v.* General Accident, Fire & Life Assurance Co., 202 Mass. 169, 172. A promissory note complete as to form and payable to a named person may be negotiated to that person by being sold to him or taken by him for value. This is the common and popular signification of the word. It was the sense in which it was used in the law merchant before the negotiable instruments act. Its meaning has not been changed by the act. That was in substance the decision in Boston Steel & Iron Co. *v.* Steuer, 183 Mass. 140."

The court also held that there had been a delivery by the indorser prior to the filling in of the blanks and the delivery to the payee within the meaning of section [14]. It seems to me that this decision rests upon three elements. *First*, that the defendant charged with liability in that case had made a conditional "delivery" within the meaning of the statute; *second*, that the payee was a stranger to these conditions; *third*, that the person to whom the defendant delivered the note transferred it to the payee by bargain or agreement which would have been valid except for conditions made by the defendant to which the payee was a stranger. In the present case as shown above, no such elements exist. There never was a delivery of the check conditional or otherwise by any party to the note. It was feloniously taken. The payee was not a stranger to the conditions upon which the maker had authorized delivery to

the payee and, finally, the note was not "negotiated" to the payee by bargain or agreement but was delivered to the payee to become a complete and valid instrument only upon the payee selling to the maker the stamps for which this check was actually drawn. In other words, if there was a bargain or agreement made with the payee, it was an agreement with the maker to sell to the maker, and not to a thief, the stamps. In the absence of these elements, I do not think that even under the Massachusetts rule is this plaintiff a holder for value.

It follows that the judgment should be affirmed, with costs.

WHITAKER, J., concurs; FINCH, J., not sitting.[1]

SCHOLFIELD *v.* EARL OF LONDESBOROUGH.

HOUSE OF LORDS. 1896.

[1896] A. C. 514.

THE appellant brought an action against the respondent upon a bill of exchange purporting to be for 3500*l.*, payable three months after date. The bill was written out by Scott Sanders, the drawer, for the sum of 500*l.*, on a 2*l.* stamp; and, in that condition, was presented by him to the respondent, who accepted it. After acceptance, the drawer fraudulently increased its amount by inserting the figure "3" between the letter "£" and the figures "500," in the corner of the bill, by writing the word "three" at the end of the second line, and by writing the word "thousand" at the beginning of the third line before the words "five hundred" in the body of the bill. It is now obvious that Scott Sanders, when he wrote the bill, must have had in contemplation the alterations which he subsequently made, and that he purposely used a stamp of unnecessary value, and left the spaces which he afterwards filled up as above described, in order to facilitate his fraud. The altered bill was indorsed by Scott Sanders to one Scott, from whom the appellant acquired it in good faith and for value. In his defence to the action, the respondent, while denying all liability, paid into court the original amount of 500*l.* Charles J., before whom the action was tried without a jury, gave judgment for the defendant upon the grounds appearing in the report below.[2] This decision was affirmed by the majority of the Court of Appeal (Lord Esher M.R. and Rigby L.J., Lopes L.J. dissenting) upon other grounds.[3] From these decisions the plaintiff brought the present appeal.

LORD HALSBURY, L.C. . . . It is not contended that the bill is not a forgery, and if nothing else appeared it would, of course, be a suffi-

[1] Affirmed without opinion, 180 N. Y. App. Div. 891 (1917). See 30 Harv. L. Rev. 515.

[2] [1894] 2 Q. B. 660.

[3] [1895] 1 Q. B. 536.

cient defence for the acceptor to plead and prove that he never accepted any such bill as that for which the plaintiff brought his action. But it is contended that the form of the bill was such that the respondent was negligent in accepting it.

The bill as originally accepted was so far in ordinary form and perfect that but for some criminal act it was, in its then form, a complete bill of exchange, leaving nothing to be added to or taken from it. It is said, indeed, that certain spaces were left which gave opportunity for the insertion of the added words and figures, and if by that is meant that the words and figures were not written so closely together as to prevent the insertion of other words and figures, the observation is true. But when it is said that certain spaces were left, it is to be remembered that there was nothing unusual or calculated to excite attention in the intervals between the written words and figures by which the bill was made. As a matter of fact, the person who drew the bill intended to draw it in such a way as to enable him to fill up the intervals between the letters and figures in question; but, to my mind, there was nothing suspicious in the appearance of the bill when tendered to the respondent for acceptance.

I cannot myself understand why the particular form of fraud adopted in this case should have any different operation in giving validity to a forged instrument rather than other forms of fraud to which instruments are subject. I am not aware of any principle known to the law which should attach such consequences to a written instrument when no such principle is applicable in any other region of jurisprudence where a man's own carelessness has given opportunity for the commission of a crime.

A man, for instance, does not lose his right to his property if he has unnecessarily exposed his goods, or allowed his pocket-handkerchief to hang out of his pocket, but could recover against a bonâ fide purchaser of any article so lost, notwithstanding the fact that his conduct had to some extent assisted the thief. It is true that stolen goods sold in market overt could be retained by a bonâ fide purchaser for value, notwithstanding they had been previously stolen; but the same result would follow equally whether the owner had been careful or careless in the custody of his goods.

The truth is that the whole doctrine, that facilitating forgery, or giving opportunity for forgery, or so acting that a forgery is a possible result, affects the validity of the instrument forged, may be traced in English law, at all events, to the case of Young *v.* Grote,[1] and probably beyond, to certain doctrines of the civil law, which, to my mind, form no part of the law merchant so far as it exists in English jurisprudence.

That case has been pushed so far in argument that I think the time has come when it would be desirable for your Lordships to

[1] 4 Bing. 253.

deal with it authoritatively, and to examine how far it ought to be quoted as an authority for anything.

It is to be observed that when one looks at the judgments delivered there is an inextricable confusion, not only among the different judges, but in the judgment of each judge in turn. . . .

My Lords, I am not concerned to discuss whether the particular mode in which a written order which was given by the banker to his customers for the purpose of being filled up in the usual way before signing it may afford ground for saying that the banker was misled by his own customer. If, to use Lord Cranworth's phraseology, the customer by any act of his has induced the banker to act upon the document by his act or neglect of some act usual in the course of dealing between them, it is quite intelligible that he should not be permitted to set up his own act or neglect to the prejudice of the banker whom he has thus misled, or by neglect permitted to be misled.

I do not say that had I been the arbitrator I could have agreed that there was in the particular case any such neglect as would have come up to this proposition; but the principle, as Lord Cranworth says, is a familiar one, though it may not have been properly applied to the then state of facts.[1] . . .

My Lords, I do not myself think that either the original by Scacchia or the commentary by Pothier are relevant to the matter in hand. We are not dealing here with either "mandant" or "mandatory," and I do not think that it is part of the commercial law of England howsoever applied; and before accepting the modified doctrine of Pothier it is well to see what that doctrine is.

That learned author, who gives the case of the forger who has added a cipher to the sum written in figures, and gives it expressly as an example illustrative of his principle, proceeds to shew that it is founded on certain pronouncements of the civil law, and proceeds accordingly to shew that a slave sold with a knowledge that he was a thief makes his master responsible to the purchaser for any theft he may commit.

M. Bugnet, the learned commentator, points out in the note quoted that it is impossible to render the drawer responsible for an act to which he is no party, and it would be impossible to particularise all the precautions that it would be necessary to take. The language used, "la faute du tireur," may be satisfied by a great many things which certainly the English law would not recognise as an answer, but which the language of Pothier would obviously include.

The careless keeping of a cheque-book, like the careless keeping of the seal in the Bank of Ireland *v.* Trustees of Evans' Charities,

[1] Since Best, C. J. in Young *v.* Grote quoted Pothier, the Lord Chancellor discusses his commentary upon Scacchia at length.

[2] 5 H. L. C. 389 (1855).

might well satisfy the words "faute du tireur," and I confess I should regard with great apprehension a decision that anything that a jury should regard as "faute du tireur" should render a forged instrument valid.

As M. Bugnet truly says, it is impossible to particularise all the things that might have to be considered — the sort of paper, the ink. There are well known precautions which, for greater security, some banks take to prevent the forgery of their notes. There is some colour which prevents, or at all events renders difficult, imitations by photography; and is it to be in each case a question for the jury whether this or that precaution was omitted in drawing a bill, or in accepting it when drawn?

It seems to me it would be a very serious proposition to lay down that such questions should be permitted to arise when dealing with such an instrument as a bill of exchange; and other questions would then arise, as, I think, was pointed out in the course of the argument — a minute examination of every bill tendered for acceptance, and a consideration of how far its form might give an opportunity to a forger to forge and escape detection. . . .

It appears to me that even the modified rule laid down by Pothier, considering the principles on which that learned author himself relies for its acceptance, is not and never has been the law of England. I think this appeal ought to be dismissed with costs.

Lord Watson. . . . In my opinion, Young *v.* Grote can have no bearing upon the present case, if it was decided upon the ground that the customer, by signing a blank cheque, had given implied authority to fill it up to any subsequent holder. Whoever signs a cheque or accepts a bill in blank, and then puts it into circulation, must necessarily intend that either the person to whom he gives it, or some future holder, shall fill up the blank which he has left. No such inference would be reasonable in the case where the drawer or acceptor signs for a particular sum specified on the face of the document. If, on the other hand, the decision in Young *v.* Grote was based upon the ratio that the customer, in filling up the cheque through his wife, whom he had constituted his agent for that purpose, had failed in the duty which he owed to his banker by giving facilities for its fraudulent alteration, I am not prepared to affirm that it cannot be supported by authority. But it does not, in my opinion, necessarily follow that the same rule must be applied between the acceptor of a bill of exchange and a holder acquiring right to it after acceptance. The duty of the customer arises directly out of the contractual relation existing at the time between him and the banker, who is his mandatory. There is no such connection between the drawer or acceptor and possible future indorsees of a bill of exchange.

The duty which the appellant's argument assigns to an acceptor is towards the public, or what is much the same thing, towards those

members of the public who may happen to acquire right to the bill, after it has been criminally tampered with. Apart from authority, I do not think the imposition of such a duty can be justified on any sound legal principle. In many if not most cases which occur in the course of business, the bill is written out by the drawer, and sent by him to the acceptor, who is under an obligation to sign it. Assuming the appellant's argument to be well founded, it would be within the right of the acceptor to return the bill unsigned, if it were not drawn so as to exclude all reasonable possibilities of fraud or forgery. The exercise of that right might lead to very serious complications in commercial transactions. Besides, it is not consistent with the general spirit of the law to hold innocent persons responsible for not taking measures to prevent the commission of a crime which they may have no reason to anticipate: although there may be an exception in the case where one of the parties to the instrument has, either by express agreement or by implication established in the law, become bound to use such precautions. I am therefore unwilling in the case of an acceptor to affirm the doctrine upon which the appellant relies, unless it can be shewn to be established by authority as part of the English law merchant. . . .

The result of the English authorities is, in my opinion, decidedly adverse to the appellant. Before the present action was brought, the rule for which he contends had, so far as I have been able to find, never been enforced in an English Court or affirmed by an English judge. . . .

I desire to add that, had your Lordships thought fit to accept the legal argument of the appellant, I should not have been of opinion that the claim which he makes in this action was excluded by s. 64 of the Bills of Exchange Act.[1] That clause admits an action for the altered amount of the bill, when the acceptor has authorized the alteration. Accordingly, on the supposition already made, if it had been shown that he had failed to discharge his legal duty to the appellant, the respondent would have been estopped from saying that he did not authorize the fraud committed by Scott Sanders. That estoppel by negligence would, in my opinion, have been sufficient to establish that the respondent had "authorized" the fraudulent alteration within the meaning of s. 64.

For these reasons, I also am of opinion that the judgment appealed from ought to be affirmed.

Lord Macnaghten.[2] . . . With regard to the gaps or vacant spaces in the bill as presented to Lord Londesborough, I think a person of ordinary prudence who had confidence in the man with whom he was dealing, and who never had had his attention called to this species of fraud, might well have passed them by unnoticed, or if he had happened to notice them might have thought them of no

[1] Like N. I. L. § 124.

[2] The concurring opinions of Lords Morris, Shand, and Davey are omitted.

moment. I cannot think that there is any rule which forbids you to give a person with whom you are acquainted, and whom you believe to be honest, some little credit for honesty even when he comes for your promised acceptance to a bill of exchange. I cannot think that even on such an occasion you are bound to scan his handiwork with the eye of a detective, as the production of a would-be forger. The prevention of crime is perhaps better left to the operation of the criminal law.

However that may be, I agree with your Lordships in thinking that the supposed duty does not, in fact, exist.

Both the learned judges who are in favour of the doctrine refer it to "the principle of Young *v.* Grote." Young *v.* Grote is a case which has excited as much diversity of opinion as any case in the books. It has given rise to various explanations not altogether uniform or consistent. That circumstance of itself is regarded by some judges as a badge of merit and a passport to the confidence of the profession. But when you are in search of a principle, the effect is rather embarrassing. . . .

Passing from authority, I must say that I am not at all persuaded that the contention on the part of the appellant can be supported on principle or on grounds of convenience. It was said that the negotiability of bills of exchange would be seriously impaired if persons who act as Lord Londesborough acted are not to be held liable for all the consequences of their want of caution. But I must say I was very much struck with some observations which fell from one of your Lordships during the argument, to the effect that the consequences to the transaction and dispatch of mercantile business would be serious indeed if it were laid down that a person under obligation to accept a bill was at liberty to refuse or delay acceptance, on the ground that there was something in the form of the instrument of which a skilful forger might perhaps take advantage. After all, it is the drawer of a bill of exchange who has control over its form: the obligation of the acceptor is to pay the bill at maturity. Censorship over the form of the instrument is, I think, no part of his duty.

I am of opinion that the appeal must be dismissed.[1]

ROBB *v.* PENNSYLVANIA CO. FOR INSURANCE, ETC.

SUPERIOR COURT, PENNSYLVANIA. 1897.

3 Pa. Superior Ct. 254.

ASSUMPSIT by a depositor against his bank to recover the amount of two checks paid by the bank and alleged to have been forged.

In 1893 the plaintiff as president of a corporation had occasion to

[1] Cf. London Joint Stock Bank *v.* MacMillan, [1918] A. C. 777. The authorities are collected in 31 Harv. Law Rev. 779.

send out a large number of invitations to a banquet, and in order to save himself the labor of writing his name so often, had a rubber stamp made which would make a *facsimile* of his signature. For a time the stamp was kept in the company's office, but after he resigned the presidency it was sent to his private office which he rented from a gentleman who had the adjoining office. With this office he was entitled to the services of an office boy, of about sixteen years of age. For about nine months he employed this boy for errands and messages, including the sending of him to bank to draw money on checks. He never had occasion to doubt the boy's honesty. When the rubber stamp was returned to the plaintiff from the corporation office, he placed it in a compartment inside of a fire proof safe. He locked this compartment and put the key in a drawer in the safe, behind some papers, and covered it up. He then locked the drawer and put the key in another unlocked drawer in the safe. He then locked the safe and put the key in a little box, which he put in a wooden drawer or box, and this was kept on top of another safe. The plaintiff's surmise was that the office boy had watched his moves, found where he kept the safe key, opened the safe and rummaged around until he found the stamp, and with it signed the two checks.

The defendant appeals from judgment of the Common Pleas on verdict for the plaintiff.[1]

RICE, P. J. . . . The defendant's first proposition is, that if a depositor, without the knowledge of his bank, has a rubber stamp made which is a substantial *facsimile* of his bank signature, he cannot hold the bank responsible for a loss which occurs by reason of the unauthorized signing by a third person of the depositor's signature to a check by means of this stamp. It will be observed that this proposition assumes that the depositor is responsible for the loss although there be no negligence on his part in the manner of keeping the stamp. If he keep it as securely as possible, if, for example, he should keep it securely locked in the best modern safe, to which no other person has access, and a burglar should break into the safe and use the stamp to affix the depositor's signature to a check, and the bank should honor the check, the loss would fall on the depositor. This is not an extreme statement of the defendant's position. But it is not unlawful for a man to have a rubber stamp by which a *facsimile* of his written signature may be affixed to papers. Nor is it so extraordinary a thing as to warrant a bank in presuming, without inquiry, that a depositor will not possess nor use such a stamp for any purpose. If the owner place it in the hands of a third person for the purpose of affixing his signature to certain papers, and he without authority, use it to forge the signature of the owner to checks, it might well be argued that the bank honoring the checks should not be responsible for the loss.

[1] The statement of facts is taken from the opinion of the court.

In such a case there might be propriety in applying the maxim that where one of two innocent persons must suffer, he should suffer who by his own acts occasioned the confidence and the loss. In the case supposed the loss would be traceable to the act of the owner of the stamp in the selection of the agent to use it. In the case in hand it was traceable, proximately, to the criminal act of a third person in the use of the stamp, and more remotely to his tortious, if not criminal, act in possessing himself of it against the will of the owner. In the former case there would be an element of negligence in the care of the stamp, while in the case in hand (looking at it from the present standpoint) there is none. These distinctions are well illustrated in Penna. R. R. Co.'s Appeal, 86 Pa. 80, where it was held that if the owner of stock intrusts the certificates with blank powers of attorney to an agent for safe keeping, who fraudulently transfers them to a third party, who, in turn, without the knowledge of the fraud, has them transferred to himself, the owner cannot recover from the corporation for the loss. This decision was put upon the ground that the owner had been negligent, and should not be permitted to shift from herself to the corporation the loss which resulted from the dishonesty of her own agent. . . . Judge SHARSWOOD conceded, that had the certificates of stock been lost or stolen from the possession of the owner the corporation would have been responsible for permitting the fraudulent transfer. See also Biddle *v.* Bayard, 13 Pa. 150.

We are referred to the decisions relative to the alteration of negotiable instruments by filling up blanks left by the maker. But in these cases there is an element of either negligence or of agency. It is a well settled principle in the law of negotiable securities, that, if the maker of a bill, note or check issue it in such a condition that it may be easily altered without detection, he is liable to a *bona fide* holder who takes it in the usual course of business before maturity. "The maker ought surely not to be discharged from his obligation by reason or on account of his own negligence in executing and issuing a note that invited tampering with:" Brown *v.* Reed, 79 Pa. 370, citing Phelan *v.* Moss, 67 Pa. 59; Garrard *v.* Haddan, 67 Pa. 82; Zimmerman *v.* Rote, 75 Pa. 188. According to these decisions the question is not, whether the maker so drew the paper as to make it possible to alter it without detection, but whether he used ordinary care and precaution. . . .

The rule, that where one of two innocent persons must suffer loss that party who did the act which was the occasion of the loss ought to bear it, is often misapplied to cases where the two persons are not equally without fault, but where one owes a duty to the other to do, or to refrain from doing, a particular thing, and has failed in the performance of that duty. But a man's responsibility, even for his negligence and that of his servants must end somewhere. As was truly remarked in Hoag *v.* Lake Shore, etc. R. R. Co., 85 Pa. 293,

there is possibility of carrying an admittedly correct principle too far. It may be extended so as to reach the *reductio ad absurdum*, so far as it applies to the practical business of life. The doctrine as to remote and proximate cause as held in Pennsylvania has been thus stated in many cases: "In determining what is proximate cause the true rule is that the injury must be the natural and probable consequences of the negligence; such a consequence, as under the surrounding circumstances of the case might and ought to have been foreseen by the wrong doer as likely to flow from his act." Hoag *v.* R. R. Co., supra; Pass. Ry. Co. *v.* Trich, 117 Pa. 390; Swanson *v.* Crandall, 2 Pa. Superior Ct. 85. The same rule, and for a stronger reason, applies when it it sought to hold one liable for the consequences of a lawful and non-negligent act. To apply the maxim invoked here, without regard to the question whether the act was the remote or proximate cause of the injury, would establish a degree of responsibility "quite beyond any legal limitations which have yet been declared." This would be a striking illustration of the danger of carrying an admittedly correct principle too far.

A bank is bound to know the signature of its depositors, and if it pay out the money on a forged check it cannot charge the depositor with the amount, but as against him must bear the loss. It may be conceded that the relation of the depositor to the bank implies a duty on his part to subject it to no extraordinary risks with regard to payment of his checks which he may avoid by the exercise of ordinary care and prudence. But we cannot assent to the proposition that it is negligence per se for him to have in his possession a harmless and useful thing, and one lawful for him to have, but which, in the hands of a thief breaking into his house or his safe, may be used to forge his signature. If he commit the use of it to an agent, selected by himself, or leave it in such a place as to invite the use of it for illegitimate purposes, there would be plausibility in the contention that he should be deemed to contemplate such use as one of the natural and probable consequences of his act. But, where he has used due care in securing it against unlawful use by others, it cannot be said that his mere possession of the thing was the proximate cause of the mispayment of the money to one who unlawfully possessed himself of it, and used it to commit a forgery.

The defendant's second proposition is, that, even if the court did not err in leaving the question of regligence to the jury, the instructions given by the court were insufficient and erroneous, and laid down a wrong standard of negligence.[1] . . . Notwithstanding

[1] The second error assigned was in qualifying and answering the second point submitted on the part of the defendant, as follows:

"If the plaintiff had a rubber stamp made which was substantially a facsimile of his bank signature, and left the stamp where others could have access to it, and did not inform the defendant of it, he cannot hold the defendant liable for

the plaintiff's precautions to guard the stamp, it was not kept where it would be absolutely inaccessible to others. It follows that an unqualified affirmance of the defendant's second point would have been equivalent to binding instructions to find for the defendant. But, for the reasons given in our discussion of the first proposition, the defendant was not entitled to such instructions. The practical effect would be to hold the owner of a rubber stamp up to the same standard of responsibility as the owner of a vicious animal; in other words, to hold that he is bound to keep the stamp at all hazards where a trespasser or a thief cannot possibly get possession of it and use it. This is not the standard of his responsibility to the bank in which he is a depositor or to the public. He is not an insurer against its unlawful use, but it may be conceded that he is responsible for the consequences of his negligence in keeping it. He is bound to exercise the care of an ordinarily prudent man. To adopt the language of the learned trial judge; "was it put away in such a manner as was, in view of all the probabilities of the case, sufficient to protect the stamp from being improperly used?" This was a question of fact for the jury, and was fairly submitted. There are cases in which the court can determine that omissions constitute negligence, but they are exceptional — those in which the precise measure of duty is determinate, the same under all circumstances. What constitutes negligence when the standard shifts, not according to any certain rule, depends upon the facts and circumstances developed at the trial, and cannot be determined by the court, but must be submitted to the jury: D., L. & W. R. R. Co. *v.* Jones, 128 Pa. 308, and cases there cited. . . .

Judgment affirmed.[1]

loss in consequence of that stamp. *Answer:* I have already stated to you what is substantially the same as that contained in this point; that if he had such a stamp made, and left it where people could have access to it easily in the way I have described — if it was lying around where people could probably stumble on it, or in the ordinary course of their relation to the business would find it at hand, then the defendant would not be liable for this loss. The question is whether that was the way in which it was left, or whether it was put away in such a manner as you would say was, in view of all the probabilities of the case, sufficient to protect the stamp from being improperly used."

[1] Affirmed by the Supreme Court in 186 Pa. St. 456 (1898), two judges dissenting.

McCollum, J., said: "An act which is in and by itself entirely lawful, and which had no relation to the plaintiff's deposit with the defendant, did not impose upon the former the duty of notifying the latter of the performance of it, and if such a duty was not created by the plaintiff's procurement of the stamp, the loss occasioned by the use of it in the perpetration of the forgeries did not necessarily fall upon him. If, however, the forger obtained possession of the stamp through the negligence of the plaintiff, the responsibility for the loss occasioned by the forgeries would not rest upon the defendant if its cashier exercised due care in the inspection of the checks. It is needless to inquire on this appeal whether such care was exercised by the cashier, because the question is not raised by the assignments."

Williams, J., dissenting, said: "If the depositor executes a check and for

MERCHANTS NATIONAL BANK *v.* SANTA MARIA SUGAR CO.

SUPREME COURT, NEW YORK, APPELLATE DIVISION. 1914.

162 N.Y. App. Div. 248.

THE action was to recover $2,340 on the following paper executed by the defendant:

"I shall pay to the order of the American Hoist & Derrick Co. on the 30th day of August, 1911, in the City of New York, the sum of Two thousand three hundred and forty ($2,340) dollars currency, for amount of the second installment agreed on of a crane of their

any reason leaves it on his table where it is found by another, who fills it up, presents it at bank and receives payment upon it, this is a good payment by the bank, and the loss is that of the depositor for the check was signed by him. If instead of leaving his check upon the table the drawer had deposited it in a drawer within his safe, locked the safe, and put the key away in a box in his office precisely as Mr. Robb did with his stamp, nevertheless if a clerk or employee had taken the key from the box, unlocked the safe, abstracted the check and used it for his own benefit, its payment by the bank would have bound the depositor. . . . This principle rules the case now before us. It is conceded that Mr. Robb caused the stamp to be made with which this check was executed. He says he only intended to use it for a particular purpose, but it is perfectly apparent that he intended his signature produced by this stamp should be recognized as his by the friends and acquaintances who should receive it, as it certainly would be. The signatures made by it as they are presented to us in the paper-books, when placed by the side of admittedly genuine signatures are indistinguishable from them. . . . He was bound to take care of it as safely as of his own signature made by himself with his own hand. He was bound to do this at his peril. There is no question of reasonable or sufficient care in this case. As with the signed check so with this stamp signature. . . . He seeks in this action to put his own proper loss upon the bank that paid the checks by alleging that the checks were forged. But they were not forged. The signature was his. He prepared it. All that can be said is that he did not affix it to the checks. But he had prepared it so that any one could affix it to a check or any other paper and when so affixed it was absolutely impossible to tell that it had not been done by him. There would be some justification for his claim upon the bank if he had advised the banker that he had prepared such a signature that might by a possibility be clandestinely gotten from his possession, and given him an impression made by it and pointed out, if he could have done so, how it might be distinguished from his signature as made by a pen, but he did nothing of the kind. If the bank is not protected by his signature made by means of his own private stamp, if they are bound at their peril to know and discriminate between his signature made with his pen and that made with his private stamp, then he has by the use of the stamp very greatly increased the responsibility and peril of the banker without so much as giving him notice or affording the slightest intimation of the necessity for additional vigilance in scrutinizing checks purporting to bear his signature." . . .

See Forgery by Means of a Rubber Stamp, I. J. Williams, 37 Am. L. Reg. (N.S.) 745 (1898); Ewart on Estoppel, 65.

Careless use of protectograph is a defence for a bank which has paid a raised check. Second National Bank *v.* Campbell, 21 Oh. C. C. Rep. (N.S.) 305 (1914); criticized in 28 Harv. L. Rev. 624.

manufacture purchased on this date, according to specifications of their representative, Mr. H. S. Johannsen.

Dated, INGENIO, SANTA MARIA, *Aug.* 30, 1910.

(Signed) SANTA MARIA SUGAR CO.

BERNARD PONS.

For $2,340.00 Cy. together with interest at 6% per annum to August 30, 1911."

The complaint alleged that thereafter and before its maturity, to wit, on or about March 29, 1911, the payee indorsed and delivered the note to the plaintiff for value. Upon the trial it was stipulated that the complaint should be dismissed without prejudice to the right of the payee to sue the maker if the court found that the instrument was not negotiable or that the plaintiff was not a *bona fide* holder for value; otherwise judgment should be entered in favor of the plaintiff for the amount of the note sued on, with interest and costs.

In its decision the court made findings of fact as follows:

That before maturity, and on or about the 29th of March, 1911, the American Hoist and Derrick Company discounted said note with the above-named plaintiff.

That the plaintiff credited the American Hoist and Derrick Company, which maintained a regular drawing account with the plaintiff, with $2,427.36, the value of said note.

That immediately after the discounting of said note the balance on hand to the credit of the American Hoist and Derrick Company was $22,661.13, and that between the date of the discounting of said note, which was March 29, 1911, and the time when the plaintiff was notified by the defendant of the latter's objection to the note, which was sometime shortly after April 26, 1911, the American Hoist and Derrick Company deposited the sum of $129,547.60 with the plaintiff and withdrew from the plaintiff day by day such sums as to make the total of $110,999.58.

That during said period the smallest balance on hand at the bank to the credit of the American Hoist and Derrick Company was $6,294.04 on April 18, 1911.

As conclusions of law, the court found that the instrument was a negotiable promissory note, but that the plaintiff did not take for value; and dismissed the complaint in accordance with the stipulation. The plaintiff appeals.[1]

CLARKE, J.[2] . . . The Trial Term found that until one month after plaintiff had discounted the instrument it had no knowledge or suspicion of any infirmity therein or equities existing. The question, therefore, is whether by discounting the note and by the subsequent transactions on the account it can be considered that value passed therefor. Of course the mere discounting of the note and

[1] The statement of facts is condensed from the opinion.

[2] The finding of negotiability was affirmed, under N. I. L. 3-2.

placing the amount of said discount to the credit of the holder would not then have constituted a transfer for value, because the bank would, under those circumstances, have parted with nothing; there would have been a mere bookkeeping entry. (Scott *v.* Ocean Bank in City of New York, 23 N. Y. 289; Citizens' State Bank *v.* Cowles, 180 id. 346; Albany County Bank *v.* People's Ice Co., No. 1, 92 App. Div. 47.)[1] But, if the sum had subsequently been checked out, then value would have passed.

The respondent claims that the bank always had on account a sum in excess of the amount of this note. The lowest balance on any day during the period was upwards of $6,000. But the appellant claims that the rule of law is, "The first money in is the first money out," that the first items on the debit side are charged against the first items on the credit side. It paid out continually and the only reason that it had a balance at the end of the period was by reason of a continual flow of deposits, but those subsequent deposits went to meet subsequent drawings. This credit was exhausted long before the period expired.

In Fox *v.* Bank of Kansas City (30 Kan. 441) the bank brought an action against Fox, the maker of the note, and the First National Bank of Emporia. The note was transferred by the payee to the Emporia Bank and by it indorsed to the Bank of Kansas City, which was the correspondent of the Emporia Bank, and the latter had a general account with it. No money was forwarded to the Emporia Bank at the time the note was discounted, but the amount of the discount was simply credited. It appeared that the note was discounted and the amount credited to the Emporia Bank on February fifteenth; that at the close of that day the amount on the credit side of the account from the first of February was $52,802.36, the amount on the debit side $32,479.58, leaving a balance due the Emporia Bank of $20,322.78. During the subsequent five days ending February twenty-first the Emporia Bank drew out $26,774.67, which, but for subsequent deposits by the Emporia Bank, would have overdrawn the account. In other words, within five days after this discount everything then due the Emporia Bank was paid to it, and it was claimed by plaintiff that at that time, if not before, plaintiff had fully paid the note and was entitled to the full protection of a purchaser for value. Mr. Justice BREWER said: "This claim we think is correct. The general rule as to the application of payments, there being no special facts to interfere, is that the first payments go to the oldest debts; so all the money drawn out by the Emporia bank, in the absence of some special facts, was a payment

[1] *Contra*, Royal Bank *v.* Tottenham, [1894] 2 Q. B. 715 (C. A.); Capital &c. Bank *v.* Gordon, [1903] A. C. 240, in which Lindley, L. J. said, 249: "It must never be forgotten that the moment a bank places money to its customer's credit the customer is entitled to draw upon it, unless something occurs to deprive him of that right."

by the plaintiff of the oldest deposits and discounts; and when, at the close of February 21, the balance due February 15, had been fully checked out, the plaintiff had paid for every deposit and discount made by the Emporia bank prior to February 15." [1] . . .

I am of the opinion that as there is no controlling authority in this State to the contrary we should agree with the well-reasoned opinion of Mr. Justice BREWER (*supra*), followed as it has been in five other States and apply the rule recognized in National Park Bank *v.* Seaboard Bank (114 N. Y. 28, 35) that the first debits are to be charged against the first credits. It follows, therefore, upon the facts as found, that the bank was a *bona fide* holder for value. . . . The judgment appealed from should, therefore, be reversed and judgment for the plaintiff entered as indicated, with costs to the appellant.[2]

SMITH *v.* BAYER.

SUPREME COURT, OREGON. 1905.

46 Or. 143.

THIS is an action by Milton W. Smith against J. C. Bayer and Peter Hobkirk on a promissory note for $290, to the order of the Concordia Loan & Trust Co., which was indorsed to the plaintiff as follows:

"Pay to the order of Milton W. Smith for collection and return to Concordia Loan & Trust Co.

A. D. RIDER, *Treasurer.*"

The defense was that the note remained the property of the payee till after maturity, when it was assigned to the Fidelity Trust Co., which was thereafter paid by the defendants in full. The reply was that the plaintiff was at all times owner in his own right of two sevenths of the note, and since the indorsement was owner of the remaining five sevenths for collection. The verdict and judgment were in favor of the plaintiff, and the defendants appeal.[3]

Mr. JUSTICE BEAN delivered the opinion of the court.

. . . The only points of real importance on this appeal are: (1) Whether the indorsement, being on its face "for collection and return" to the payee, vested plaintiff with such a title as will enable him

[1] Clarke, J. also cited Dreilling *v.* First National Bank, 43 Kan. 197 (1890); United States National Bank *v.* McNair, 114 N. C. 335 (1894); Fredonia National Bank *v.* Tommei, 131 Mich. 674 (1902); First National Bank *v.* McNairy, 122 Minn. 215 (1913); Morrison *v.* Farmers, 9 Okla. 697 (1900); National Park *v.* Seaboard Bank, 114 N. Y. 28 (1889). He distinguished Albany County Bank *v.* Ice Co., 92 App. Div. 47 (1904) and Citizens' State Bank *v.* Cowles, 180 N. Y. 346 (1905).

[2] Affirmed without opinion, 220 N. Y. 732 (1917).

[3] The statement of facts has been condensed.

to maintain an action thereon in his own name; and, if so, (2) whether the court erred in admitting parol testimony tending to show that plaintiff was in fact the owner of two sevenths of the note, and in instructing the jury that, if such was the case, any settlement with the payee or assignee subsequent to the date of the indorsement to plaintiff would be no defense as against plaintiff's two sevenths.

The indorsement of a promissory note by the payee with the words "for collection," or the like, is not strictly a contract of indorsement, but rather the creation of a power, the indorsee being the mere agent of the indorser to receive and enforce payment for his use. The title to the note and the proceeds thereof remain in the payee, and he may maintain suitable actions and proceedings to enforce his right. . . .

There is, in the absence of a statute, some conflict in the decisions as to whether such an indorsee can sue in his own name. The weight of authority seems to be in favor of his right to do so. . . .

It is now so provided by statute in this State: [N. I. L. § 37]. We are therefore of the opinion that the present action was rightfully brought in the name of the plaintiff.

It was open, however, as against him, to all defenses which could have been made if the notes had remained in the hands of the indorser, and the action had been brought by it: Wilson *v.* Tolson, 79 Ga. 137 (3 S. E. 900); Leary *v.* Blanchard, 48 Me. 269. The indorsement did not pass the title, nor did it deprive the defendants of any defense they may otherwise have against the note. It merely created the plaintiff the agent of the payee for collection with the right to sue in his own name. The plain meaning of such an indorsement, as said by Mr. Justice MILLER (White *v.* National Bank, 102 U. S. 658, 26 L. Ed. 250), is that the maker of the note "is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser."

Such being the effect of the restrictive indorsement and the character of the title acquired by the plaintiff by reason thereof, it necessarily follows that the court was in error in admitting evidence to contradict the contract of indorsement by showing that the note was not transferred to the plaintiff for collection as shown on its face, but that he actually owned two sevenths thereof in his own right, and in instructing the jury that a settlement made with the payee after the indorsement to plaintiff would be no defense against plaintiff's two sevenths. The contract of indorsement is in writing. The terms thereof are plain and unambiguous, and parol evidence is not admissible to vary or contradict it: White *v.* National Bank, 102 U. S. 658 (26 L. Ed. 250); Leary *v.* Blanchard, 48 Me. 269; Howe *v.* Taylor, 9 Or. 288.

The plaintiff's action is based on the indorsement, and not on any interest he may have in the note. He is made by the indorsement the mere agent of the payee for its collection. The defendants' obligation, notwithstanding the indorsement, is to the payee or subsequent owner of the note, and not to the plaintiff. If they settled and paid the note to the payee or assignee, such settlement is a complete defense to an action thereon by plaintiff as a mere agent for collection.

It may be suggested that, because the jury found a verdict in favor of plaintiff for the entire amount sued for, they must have found that the settlement alleged as a defense was never made, and therefore the error of the court in charging the jury in relation thereto was harmless. The ruling of the court upon this point and its instructions to the jury injected into the case an issue not proper to be tried, the result of which was to confuse and mislead the jury, and we do not think it can be said that the error was harmless.

From these views it follows that the judgment of the court below must be reversed, and a new trial ordered. . . .

OVERDUE OR DISHONORED PAPER

GARDNER *v.* BEACON TRUST CO.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1906.

190 Mass. 27.

MORTON, J. This is a bill in equity brought by a minor, by her next friend and guardian, to compel the defendant the Beacon Trust Company to assign and deliver to her a mortgage and the note thereby secured alleged to have been fraudulently obtained from the plaintiff's guardian by one Edwin M. Thayer, since deceased, and fraudulently assigned by him to the trust company. As to certain of the defendants the bill was dismissed, and a decree was entered in favor of the plaintiff against the trust company and other defendants. The case is here on appeal by the trust company. All of the evidence is reported.

Briefly stated the facts are as follows: In January, 1903, the plaintiff was the owner of a mortgage, and the note thereby secured, for $1,500, on land in Quincy, given by the defendant Brown to one Hattie L. Carr, and transferred by successive assignments to the plaintiff. Her mother, Mary E. Gardner now Mary E. Wales, was her guardian. The note and mortgage had been long overdue. By means of fraudulent misrepresentations that the owner of the equity wished to pay off the mortgage, Thayer obtained from the plaintiff's guardian an assignment of the note and mortgage to himself, and subsequently assigned them to the trust company as security for a note of $2,000 for money borrowed by him of the company. The trust company took the assignment in good faith for value, and without any notice of Thayer's fraud or of any defect in his title, unless the fact that it took it when the note was overdue constituted such notice.

We assume in favor of the plaintiff that the fact that the note was secured by mortgage does not effect its character as an overdue negotiable instrument when taken by the trust company, although it is said in Murphy *v.* Barnard, 162 Mass. 72, 75, that there is a distinction between the purchase of ordinary commercial paper and that of notes known to be secured by a mortgage of real estate, though bought as negotiable paper. . . . But the note did not cease to be property or to be negotiable because overdue. Baxter *v.* Little, 6 Met. 7. Fisher *v.* Leland, 4 Cush. 456, 458. Leavitt *v.* Putnam, 3 Comstock, 494. And the question is, whether, assuming for the moment the validity of the transfer by the plaintiff's guardian to Thayer, which will be considered later, the fact that the note and mortgage were overdue when the trust company took

them so affected its title as to postpone its right to that of the defrauded owner. The general rule is thus stated by Lord Herschell in London Joint Stock Bank *v.* Simmons, [1892] A. C. 201, 215: "The general rule of the law is, that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shown, a good title is acquired by personal estoppel against the true owner." He then goes on to say that there is an exception in the case of negotiable instruments, manifestly meaning those not yet due, and that as to them, any person in possession of them can convey a good title even if acting in fraud of the true owner. This is the only exception mentioned by him to the general rule which he lays down, and which would seem, therefore, to have been regarded by him as applying to overdue negotiable notes as well as to other property when circumstances brought them within it. Applying the rule thus laid down, or the rule that, where one of two innocent persons must suffer in consequence of the fraud of another, the loss must fall upon the one who by his trust and confidence has enabled the perpetrator of the fraud to commit it (Easter *v.* Allen, 8 Allen, 7; McNeil *v.* Tenth National Bank, 46 N. Y. 325), it would seem plain that the loss in this case should fall upon the plaintiff, unless the fact that the note and mortgage were overdue makes a difference. She had assigned the note and mortgage to Thayer by an instrument valid upon its face, and had delivered possession of them to him. As a consequence of her conduct he had possession of them as apparent owner with full dominion over the property which they represented. This apparent ownership was obtained from the guardian by Thayer's fraud, it is true; but although that would have enabled her to avoid the transaction as between her and him so long as the note and mortgage remained in his hands, his apparent ownership was not affected thereby.

Does, then, the fact that the note and mortgage were overdue when the trust company took them make a difference? The purchaser of an overdue negotiable note takes it subject to all the equities if any there are, attached to it at the time of the transfer in favor of the maker, the owner, or of third parties. Vinton *v.* King, 4 Allen, 562. Vermilye *v.* Adams Express Co., 21 Wall. 138. *In re* European Bank, L. R. 5 Ch. 358. *In re* Overend, L. R. 6 Eq. 344. If there are no equities attached to the note the purchaser gets as good a title after as before maturity (*In re* Overend, *supra*, 360), and it makes no difference that the note is dishonored. If there are equities attached to it, he takes it subject to them.

This is what is meant when it is said that the purchaser has no better title, legal or equitable, than his transferrer had, and that the note is subject in his hands to the same infirmities of title as against the true owner and to the same defences as against the maker which it was subject to in the hands of his transferrer. 1 Dan. Neg. Instr. (3d ed.) §§ 724 *et seq.* If for instance an overdue note is stolen from the owner, a subsequent purchaser acquires no title as against the true owner (Vermilye *v.* Adams Express Co., *supra*); if an overdue note has been paid by the maker and is fraudulently put in circulation by the payee, a purchaser, though for value and in good faith, takes it subject to the defence of payment by the maker. In such a case the very fact that the note is dishonored is sufficient to put the purchaser upon inquiry as against the maker. Gold *v.* Eddy, 1 Mass. 1. Brown *v.* Davies, 3 T. R. 80. Losee *v.* Dunkin, 7 Johns. 70. But the case is very different where the owner of an overdue note transfers it under circumstances which enable his transferee to deal with it though obtained by fraud as if he were the true owner, and when an innocent purchaser for value takes it from such transferee before the transfer has been avoided. In such a case no equity attaches to the note in favor of the true owner as against the innocent purchaser for value, since it was by his own act that the perpetrator of the fraud was enabled to commit it. The true owner of an overdue note may deal with it as with any other property, and the mere fact that the note is overdue does not in such a case, in the absence of anything in the transaction to suggest suspicion, put a purchaser upon inquiry any more than a purchaser is bound in any other case to inquire into the title of his vendor. See White *v.* Dodge, 187 Mass. 449. The possibility that the title may have been obtained by fraud exists in all cases. But that is not enough to put a purchaser upon inquiry. Any other view would put upon the innocent purchaser for value of overdue negotiable paper the onus of a defective title no matter how much he may have been misled by the conduct of the true owner. We do not think that such is the law. . . . Jones, Mortgages, § 841. Ames, Cases on Trusts, (2d ed.) 310. In Foley *v.* Smith, 6 Wall. 492, the above principle was recognized, though it was held that the facts did not bring the case within it. So far therefore as the plaintiff relies upon the fact that the note and mortgage were overdue when taken by the trust company, her contention must fail. The note being dated before January 1, 1899, the negotiable instruments act does not apply. [§ 195]. . . .

The result is that so much of the decree as adjudges that the mortgage remains, and still is the property of the plaintiff, and orders the trust company to assign and convey its interest in the same to her is reversed and the rest is affirmed.[1]

[1] Compare Y. M. C. A. *v.* Rockford, 179 Ill. 599 (1899), and Justice *v.* Stonecipher, 267 Ill. 448 (1915, N. I. L.), with Hide *v.* Alexander, 184 Ill. 416 (1900)

and Merchants *v.* Welter, 205 Ill. 647 (1903). The person estopped was not an indorser or transferor in Young *v.* MacNider, 25 Can. S. C. 272 (1895).

Zeis *v.* Potter, 105 Fed. 671, 675 (C. C. A. 7th, 1901), Woods, J., *semble:* "The purchaser of overdue or non-negotiable paper, if required to inquire of the makers whether they have any defense, may equally well be required to inquire into the rights of remote indorsers or others whose names appear on the paper. The payee and each successive indorsee, though he has parted with possession and title, may yet have an interest which, as against all but innocent purchasers for value and without notice, equity would protect; and, if convenience of inquiry is equivalent to notice of the rights of the maker, why not of any other, [when,] by reason of his name being on the paper, or by other means, the proposed purchaser is notified that he once had, and therefore may yet have, an interest? The maker often signs for accommodation, and the apparent indorser may be in fact the principal. The reasonable rule would seem to be that the purchaser of such paper should take subject to the equities of all who appear or are known to have had an interest in it."

In Wolf *v.* American Trust, 214 Fed. 761, 765 (C. C. A. 7th, 1914), Baker, J., held that the *bona fide* pledgee of a certificate of deposit assumed to be overdue must be repaid notwithstanding the fraud of the pledgor, saying:

"Many of the cases that deny relief to a defrauded owner of commercial paper under circumstances like the present, ground the decision either on equitable estoppel or on the principle that where one of two must suffer the creator of the situation shall bear the burden. . . .

"But we believe the true ground is this: An indorsement of a negotiable instrument to a named indorsee has two aspects. In one, it is a contingent contract of debt as complete and definite as if the terms thereof were written out in full above the indorser's signature; and in the other, it is a conveyance to the indorsee of the legal title to the instrument considered as a species of property — as perfect a conveyance as is the ordinary bill of sale of the ordinary chattel. Concerning the indorser's liability on his contingent contract of debt, the maturity of the instrument may or may not be important. As to the validity of the indorser's conveyance of the legal title, the maturity of the instrument is inconsequential. And so in this case, inasmuch as appellee is not counting on appellant's contingent contract of debt but is only asking him to respect his conveyance of the legal title, the principle applies, which is common to the law of all kinds of property, that the innocent purchaser of the legal title is protected against secret equities respecting the title."

A. Pichon, De l'Inopposabilité des Exceptions au Porteur d'un Titre à Ordre, (Paris, 1904), p. 236: " Tant qu'il n'est pas payé, il est clair qu'il est de l'intérêt du porteur de pouvoir obtenir immédiatement la valeur du papier qu'il possède, et que, par conséquent, ce papier puisse facilement circuler. Mais il n'est pas moins certain, et c'est là le point important, que tel est aussi l'intérêt du crédit en général. Il faut bien songer, en effet, que le porteur au jour de l'échéance, *qui a acquis le titre nécessairement avant l'échéance,* l'aura acquis d'autant plus volontiers qu'il aura été plus sur de pouvoir, à jour fixe, obtenir la réalisation de ce titre en argent soit par le paiement, soit par une transmission nouvelle. Et comme chaque porteur peut être amené à garder le titre jusqu'à l'échéance, c'est une véritable erreur économique (que commet pourtant la théorie que nous critiquons), de séparer la circulation antérieure à l'échéance et celle qui lui est postérieure; si l'on veut voir les choses d'ensemble et leur conserver leurs vrais rapports, *la rapidité de la circulation antérieure à l'échéance, dépend, en partie, de la rapidité de la circulation postérieure à l'échéance.* Si l'on veut pleinement assurer la première (et il n'y a pas de doute sur ce point), il faut aussi pleinement assurer la seconde."

The authorities on this topic are collected in an article on Rights in Overdue Paper, Z. Chafee Jr., 31 Harv. L. Rev. 1104 (1918).

COLUMBIAN BANKING CO. *v.* BOWEN.

SUPREME COURT, WISCONSIN. 1908.

134 Wis. 218.

JUNE 10, 1903, the banking firm known as the Farmers' & Merchants' Bank, of Bangor, Wisconsin, sold to the defendant a $400 draft, drawn in the usual form, dated on that day, payable to defendant's order, and drawn by such firm on the National Bank of North America, at Chicago, Illinois. The draft was sent to the defendant at Barron, Wisconsin, and was indorsed by him to A. R. Tabbert, to whom it was forwarded by mail, at Spokane, Washington, June 16, 1903, and was there received by him June 20th thereafter. He was at Spokane temporarily and was on his way to the city of San Francisco, California. July 14, 1903, he indorsed the draft and sold the same to the plaintiff at such city, receiving $400 therefor. On that day, in due course, plaintiff sent the draft by mail to the Bankers' National Bank, of Chicago, Illinois, by which it was received July 18th thereafter, and was then, as requested, duly presented to the drawee for payment, which was refused, whereupon it was duly protested for nonpayment by a duly authorized notary public. July 28, 1903, the property of the drawer was placed in the possession of a receiver, who paid $237.38 in dividends upon the draft. The plaintiff was the owner of the draft at the commencement of this action, and got judgment in the circuit court for $210. The defendant appeals.[1]

MARSHALL, J. Counsel for appellant have presented quite an extended argument, referring to many authorities, as to the law antedating and independently of the negotiable instrument statute to support the proposition that appellant was released from liability on the instrument in question, because of the period intervening between his parting therewith and the presentation thereof to the drawee for payment. Such statute was enacted for the purpose of furnishing, in itself, a certain guide for the determination of all questions covered thereby relating to commercial paper, and, therefore, so far as it speaks without ambiguity as to any such question, reference to case law as it existed prior to the enactment is unnecessary and is liable to be misleading.

The negotiable instrument law is not merely a legislative codification of judicial rules previously existing in this state making that written law which was before unwritten. It is, so far as it goes, an incorporation into written law of the common law of the state, so to speak, the law-merchant generally as recognized here, with such changes or modifications and additions as to make a system

[1] The statement of facts is condensed, and the discussion of another point is omitted.

harmonizing, so far as practicable, with that prevailing in other states. That it contains some quite material changes in previous rules governing commercial paper we have had occasion heretofore to point out. Hodge *v.* Smith, 130 Wis. 326; Aukland *v.* Arnold, 131 Wis. 64.

The primary question discussed by appellant's counsel, it is believed, is fully covered by the negotiable instrument law. There are a multitude of decisions regarding the character of a bill of exchange and that of a check, as those terms are used in business transactions, and to what extent the incidents of one are identical with those of the other, which decisions are so variant in their phrasing of the matter as to produce more or less confusion in respect thereto with many apparent, and some real, conflicts, to remedy which was one of the principal objects of the law.

[N. I. L. §§ 126 and 185 were quoted.]

As to whether the incidents of the species of bills of exchange last mentioned are the same as those of bills of exchange generally, it was further provided in the section last referred to, "Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check." The only exception referred to material to this case is contained in [N. I. L. § 186] in these words: "A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

Keeping in mind that the discharge from liability above referred to because of unreasonable delay after the issuance of a check in presenting it for payment is of the drawer only, and that this action is against the payee who indorsed the instrument in question without qualification and put it in circulation, we turn to [§ 71], which provides, as to a bill of exchange payable on demand, which from the foregoing obviously includes a check or draft on a bank of the character of the one in question, "presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof."

From the foregoing it seems plain that as regards the payee of such an instrument as we have here, who puts the same in circulation with his unqualified indorsement thereon, and all subsequent parties thereto so indorsing the same, presentment for payment is sufficient, as regards their liability, if made within a reasonable time after the last negotiation. A bill of exchange payable on demand, regardless of its character, put in circulation, so long as its circulating character is preserved may be outstanding without impairing the liability of indorsers thereof. Formerly the length of time within which a bill of exchange might circulate without impairing such liability was more or less uncertain, rendering it very difficult to determine any one case by the decision in another. That

difficulty was removed, so far as practicable, by the provision that only the time need be considered intervening between the last negotiation and the presentment. That is recognized as a radical change in the law as it formerly existed. Selover, Neg. Inst. Law, § 195.

As to an ordinary bill of exchange put in circulation, it was quite anciently held that the period between July 18th of one year and January 16th of the next year was not necessarily unreasonable. Gowan *v.* Jackson, 20 Johns. 176. Perhaps one might now keep a bill of exchange for such length of time as to destroy its circulating character notwithstanding he ultimately passed it along to another person, but that situation, as we view the case, does not exist here.

Applying the law as aforesaid to the facts of this case it is readily seen that the delay in presenting the paper for payment between its date and the negotiation to the bank at San Francisco is immaterial. Appellant unqualifiedly indorsed the paper and put it in circulation by sending it to Tabbert at a distant part of the country, probably knowing that he was a traveler. Tabbert received the paper while journeying with the intention of going to San Francisco and held it till he arrived there and then negotiated it. It was promptly presented for payment thereafter and so in time, as regards that circumstance, to preserve the liability of appellant.

The court decided, as indicated, that Tabbert was a traveler with San Francisco as his destination and properly held that such circumstance sufficiently explained, if any explanation were necessary, the lapse of time between his reception of the paper and his negotiation thereof, preserving its circulating character and warranting the finding that the respondent came thereby in due course.

By the Court. — Judgment affirmed.[1]

[1] See, Some Necessary Amendments of the Negotiable Instruments Law, J. D. Brannan, 26 Harv. L. Rev. 590, 599 (1913).

EXTINGUISHMENT

LILL *v.* GLEASON.

SUPREME COURT, KANSAS. 1914.

92 Kan. 754.

THE opinion of the court was delivered by

BURCH, J.: On April 15, 1908, Nelson Gleason executed and delivered his negotiable promissory note to the Peerless Machinery and Supply Company for $1000, due on September 1, 1908. The note was given for stock in the machinery company and was accompanied by a written contract permitting Gleason to return the stock and receive his note duly canceled by giving notice of his intention to the machinery company on or before August 1, 1908. On July 25, 1908, the notice was given but the note was not returned.

The machinery company indorsed the note in blank before maturity and left it with the Andale State Bank as security for money to be advanced to the machinery company under a contract providing that advancements should be made up to the sum of $3500 when collateral security indorsed by Michael Lill was deposited with the bank. The bank refused to make any advancement on the note until it was indorsed by Lill. Lill then went to the bank and wrote his name on the back of the note, pursuant to a contract with the machinery company to do so, which contract provided for security to Lill for his indorsement out of the company's assets. The bank then cashed the note. Gleason had no concern with any of these transactions. When Lill indorsed the note and the advancement was made neither he nor the bank had any notice of the contract between Gleason and the machinery company. When the note matured Gleason refused to pay. Upon demand of the bank Lill took up the note and received it without indorsement from the bank.

In an action by Lill against Gleason the court found the foregoing facts and held that Lill was not a holder in due course and that Gleason's defense to the note under his stock contract with the machinery company was good. Lill appeals.

The rights of the parties are governed by the negotiable-instruments law.

Lill became a party to the note for the accommodation of the payee [§ 29], and his original status, so far as liability was concerned, was that of an indorser, since he did not indicate an intention to be bound in some other capacity [§ 63]. He thus became

secondarily liable to all parties subsequent to the payee [§ 64], in this instance to the Andale State Bank.

When Lill paid the note it was not discharged. It was the policy of the law merchant and is the policy of the negotiable-instruments law to keep a negotiable instrument alive and negotiable as far as possible until the principal debtor has discharged his obligation. Discharge could not take place under either section [119] or section [121], and the general rule is that payment by a party other than the principal debtor does not discharge parties prior to the one making the payment, and the payment, instead of extinguishing the instrument, operates as a transfer of it to the party paying. (7 Cyc. 927, 1020; Note, 46 L. R. A. 781.)

The contract of an indorser for the accommodation of the payee is wholly independent of that of the maker, and such indorser, upon making payment, succeeds to the title and rights of the holder as against the maker. (1 A. & E. Encycl. of L. 356; Stanley *v.* McElrath, 86 Cal. 449; Rinehart *v.* Schall, 69 Md. 352; Shaw *v.* Knox, 98 Mass. 214; Heaton *v.* Dickson and Trust Co., 153 Mo. App. 312, 318; Sheahan *v.* Davis, 27 Ore. 278.)

The note having been indorsed by the payee in blank it became payable to bearer and negotiable by delivery [§ 34]. When it was delivered by the bank to Lill he became the bearer and holder [§ 191]. Having derived title from the bank, which was a holder in due course, and not having been a party to any fraud or illegality affecting the instrument, Lill became possessed of all the rights of the bank against the maker [§ 58]. It made no difference that the paper was overdue and unpaid, and would have made no difference if it had been shown that when he acquired title Lill had learned of the contract between Gleason and the supply company, to which, as between them, the note was subject. Section [58] of the negotiable-instruments law merely affirms the settled principle of the law merchant that when a negotiable instrument once passes into the hands of a holder by indorsement in due course the maker's right to interpose defenses good against the payee is cut off as to all subsequent holders not parties to fraud or illegality affecting the instrument. The reason is that if a holder in due course could not invest his transferee with his own capacity to recover on the paper his property rights would be materially and prejudicially reduced.

Section [121] of the negotiable-instruments law reads as follows:

"Where the instrument is paid by a party secondarily liable thereon it is not discharged, but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements and again negotiate the instrument, except: (1) Where it is payable to the order of a third person and has been paid by the drawer; and (2) where it was made or accepted for accommodation and has been paid by the party accommodated."

It is plain that the expression "remitted to his former rights" does not apply to Lill. He was a party secondarily liable who paid the instrument, but he had no former rights to which he might be remitted. After the payee had indorsed the note Lill indorsed it to acommodate the payee in disposing of it to the bank. Standing in that situation Lill had no title to the note or claim on either the maker or the payee. After he paid the note he had a right of some kind against somebody — the right to reimbursement from the party accommodated, the right to enforce the note against the defaulting maker, or both — but until he paid the note no obligation arose in his favor on the part of anybody, and of course the statute did not remit him to a stuation in which he was entirely remediless. The words "remitted to his former rights" must therefore be restricted in their application to a party secondarily liable who has himself been connected with the title to the instrument.

"Manifestly, this section refers only to indorsers for value and not for mere accommodation. An indorser for value at some time prior to his indorsement owned the note with the right to sue upon it at maturity. With this right he parted when he discounted the paper by indorsement to a purchaser for value, who in turn by like process may transfer the title, becoming liable by his indorsement to the new indorsee, and so on without limit until the maturity of the instrument. Then, whichever of the successive indorsers is compelled to pay is restored to his former rights within the meaning of this section, upon striking out his own and subsequent indorsements.

"The case is entirely different, in reason, concerning an accommodation indorser or a guarantor. Neither of them has any 'former rights,' nor, indeed, any right whatever, until he pays the note or bill.' (Noble *v.* Beeman-Spaulding-Woodward Co., 65 Ore. 93, 107.)

In the case of Quimby *v.* Varnum, 190 Mass. 211, it was well said that section [121] was intended to apply where the person secondarily liable can trace his title on the face of the note and its indorsements through the prior parties to the party whom he seeks to hold. This case, however, seems to decide generally that because an accommodation indorser has no rights before he has made payment to which he could be remitted, payment by him extinguishes the note. Such a result as to one in Lill's situation can not be deduced from section [119] or any other section of the negotiable-instruments law, is opposed to the express declaration of section [121] that payment by a party secondarily liable does not discharge the instrument, and is contrary to the policy of the law merchant. No reason is apparent why Lill, after having acquired the paper, might not have negotiated it to another had he seen fit to do so. . . .

The judgment of the district court is reversed and the cause is remanded with direction to enter judgment for the plaintiff.[1]

[1] See 28 Harv. L. Rev. 102.

NASH *v.* DE FREVILLE.

COURT OF APPEAL, QUEEN'S BENCH DIVISION. 1900.

[1900] 2 Q. B. D. 72.

PEED was employed for many years as the trusted solicitor of Major De Freville, master of the Cotswold hounds. To cover advances made by Peed, De Freville in 1895 and 1896 gave Peed three promissory demand notes to his order, which Peed agreed not to negotiate. On February 9, 1897, he gave him two more demand notes subject to the same agreement, in substitution for the first three notes, which, however, were left in Peed's hands. In March, 1897, Peed negotiated all five notes by indorsement in blank to the plaintiffs, who were tailors and money-lenders. In July, 1897, De Freville paid Peed the amount of the last two notes, but did not ask for or obtain any of the notes. He was ignorant of the negotiation and supposed the notes still in Peed's possession. In September, 1897, Peed obtained the notes from the plaintiffs in return for a check, and sent them to De Freville, who, thinking the transaction was closed, put them in the fire. On the same day, September 29, Peed absconded. His check to the plaintiffs was dishonored. The plaintiffs subsequently sued De Freville on the notes and for conversion. Lord Russell of Killowen, C.J., found as a fact that Peed gave the check intending to defraud the plaintiffs, and that they voluntarily and intentionally parted with the notes, intending to rely upon his check. He held that by virtue of §61 of the Bills of Exchange Act, 1882,[1] the notes had been discharged, the defendant having become the holder of them after maturity in his own right.[2] From judgment for the defendant, the plaintiffs appeal.[3]

A. L. SMITH, L.J. The question arises, in these circumstances, who has the better title to the notes, obtained as they were by fraud from the plaintiffs, who were the bonâ fide holders for value of the notes. Now, the notes having been obtained by Peed from the plaintiffs by fraud, although the property in the notes passed to Peed, the plaintiffs as against Peed were entitled to disaffirm the transaction on discovering the fraud, and, if, before the transaction with Peed was disaffirmed by the plaintiffs, the defendant had become holder in due course of the notes, it would then be too late in my judgment to disaffirm, so far as the defendant was concerned, and the plaintiffs could not then successfully sue the defendant either upon the notes or in trover; and the real question, therefore,

[1] "When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged." See N. I. L. p. 119–5.

[2] 15 T. L. R. 264 (1899).

[3] The statement of facts has been condensed, and the concurring opinion of Romer, L.J., is omitted.

as I have above stated, comes to this — Did the defendant, when he took the notes on September 29, 1897, from Peed, obtain a better title to them than Peed had? which means — Did he take them bonâ fide and for value and without notice of Pede's fraud and before they were due? For, if so, the defendant would in my judgment have taken a better title to the notes than Peed had, and a title which would prevail over that of the plaintiffs. That the defendant received back the notes bonâ fide and without notice of Peed's fraud is clear. The defendant, when he received the notes from Peed, knew nothing of Peed having ever parted with them, nor had he ever heard of the plaintiffs in the matter. That the defendant received back the notes before the fraud of Peed was discovered is clear, for he received them the day after the fraud was committed. But did he give value for the notes when he received them back, and did he take them from Peed before they were overdue? As to the question of value, what value did the defendant give for the notes when he took them back from Peed? He had given value for the first three notes when, upon February 9, 1897, he gave the second two notes to Peed in order to pay off the first three notes, and he gave value for the second two notes when he paid the 4000*l.* in July, 1897, to Peed to pay them off; but this was months before the fraud was perpetrated by Peed upon the plaintiffs and before the defendant got the notes back on September 29, 1897. When he got the notes back the defendant gave nothing for them. How can it be said then that he took back the notes for value? For he did not. If the case cited of London and County Banking Co. *v.* London and River Plate Bank [1] were to be held to apply to this case, we should have to hold that the defendant gave real value for the notes and then a supposed value over again for the same notes, which cannot be. But supposing the defendant did give value for the notes when he took them back, which in my opinion he did not, did he take the notes after they were due? I cannot see how it can be held that the defendant, when he received back the notes in September, 1897, though payable on demand, did not take them when overdue; for he must have known they were

[1] 21 Q. B. D. 535. [The manager of a bank stole negotiable securities from the bank and pledged them with A. Later he got them back from A by fraud and restored them to the bank vaults. The bank was ignorant of the whole transaction. A portion of the restored securities were not the bonds actually stolen, but bonds of a like kind and quality. *Held*, that the bank should be presumed to have accepted the securities in discharge of its claim against the manager for restoration. It is therefore a purchase for value and entitled to keep the bonds as against A.

Contra, Voss *v.* Chamberlain, 139 Ia. 569 (1908, N. I. L.). See the Doctrine of Price *v.* Neal, J. B. Ames, 4 Harv. L. Rev. 309, Lectures on Legal History, 283 (1891). Compare Newell *v.* Hadley, 206 Mass. 335 (1910); Money Stolen by a Trustee from one Trust and used for Another, R. D. Weston, 25 Harv. Law Rev. 602 (1912). — Editor.]

overdue if he thought about it at all, inasmuch as he had himself paid them off, the first three notes in February, 1897, and the last two notes in July, 1897. How can the defendant now say that they were not overdue in September, 1897, when he received them back? It seems to me that as the defendant did not give value for the notes when he took them back, and as, even if he did, the notes were then overdue, the defendant did not take a better title to them than Peed had, and that the plaintiffs, having disaffirmed, as they were entitled to do, the transaction with Peed, can maintain trover for the notes and bring an action upon the notes against the defendant, who has no better title to set up than that of Peed. I must point out that the difficulty which the defendant unfortunately is in arises through his own default in not getting the notes back from Peed when he paid them, thereby giving Peed the opportunity of cheating the plaintiffs as he did. It is a well-known principle of law that whenever one of two innocent persons must suffer by the acts of a third person, he who has enabled such third person to occasion the loss must sustain it: see the well-known case of Lickbarrow *v.* Mason in vol. i. of Smith's Leading Cases; and Babcock *v.* Lawson, (1879) 4 Q. B. D. 394, which contains matters very apposite to the present case.

In my opinion counsel for the plaintiffs are right in their construction of s. 61 of the Bills of Exchange Act, which was so much relied upon by the defendant's counsel, and that section does not apply to the present case, and the words "in his own right" do not mean in contradistinction to a representative right as argued for the defendant.

For these reasons I think that the appeal must be allowed, and that judgment must be entered for the plaintiffs.

COLLINS, L.J. . . . When these notes, therefore, were negotiated by Peed, they were still current, and the defendant was estopped as against the plaintiffs from setting up any fact which would have defeated Peed's right to negotiate them: for instance, the fact that Peed was under a duty to the defendant to return them and not to negotiate them. Peed then having transferred them for value to the plaintiffs, gets them back by fraud from them and passes them on to the defendant. Obviously the plaintiffs could disaffirm the transaction by which Peed got possession against any one who could shew no better title than Peed. Did then the defendant when he opened the envelope containing the returned notes get a higher title against the plaintiffs than Peed had? In my opinion, clearly not. He remained bound by precisely the same estoppel that he was bound by before; no fresh fact had intervened to displace it. It is said that he has taken for value and without notice; but the only value that can be suggested is the somewhat artificial value based on the case of London and County Banking Co. *v.* London and River Plate Bank, 21 Q. B. D. 535, namely, his implied release to Peed

of his right against him in respect of his violation of duty in negotiating the notes; but it is precisely this duty which he is estopped from setting up against the plaintiffs. He cannot, therefore, as against the plaintiffs prove any consideration given for the notes. There were no circumstances founding any such estoppel in the case cited, and if there had been, the decision must have been different. The equities in that case were equal; the bank had done nothing to facilitate the fraud of their manager; and they were not debarred from protecting their possession by the somewhat fine-drawn consideration which was there implied out of the circumstances. Here the estoppel is raised by the handing to Peed by the defendant of negotiable instruments as such, which, as pointed out by Bramwell and Brett L.JJ. in Baxendale *v.* Bennett, (1878) 3 Q. B. D. 525, is a very different thing from depositing for safe custody securities capable of being negotiated: see pp. 529 and 531 of the report; and, further, in the case of these three first bills, neglecting to resume possession of them. It would certainly be an extraordinary result if the payee who wrongfully negotiated the notes could by stealing them from the holder for value and replacing them in the possession of the maker get rid of the intervening title which was good against the maker before the theft. . . .

There is authority that a note payable on demand is after demand overdue: see Barough *v.* White, (1825) 4 B. & C. 325; Bartrum *v.* Caddy, (1838) 9 A. & E. 275. As soon as demand has been made the time for payment has arrived just as much as if the note had been made payable on a particular day which had passed. It is true that there is nothing on the face of the notes to shew that they are overdue, but had the facts known to the defendant been written on their face they would have appeared to be overdue or actually paid. How, then, can he get a better title than his transferor? For instance, if the fact of Peed's dealings had been communicated to the plaintiffs when they took the first three notes, could they have got a better title than Peed? Clearly not. But these are the facts known to the defendant when he gets back the notes, plus the additional fact that he has meanwhile paid the second set. He cannot displace the plaintiffs' title by virtue of his old right. He has got to shew a new transfer for good consideration without notice of infirmity, and this he cannot do because the notes came back to him as pieces of paper only, evidencing the fact that he had satisfied them. Could this be doubted if Peed had written on them as he might have done "paid" or "cancelled" before he put them into the envelope? These pieces of paper, therefore, as between the defendant and Peed, having lost their negotiable quality, are denuded of that element which alone makes it possible for a transferee to get a better title than his transferor. . . .

I have, I think, shewn that even if the defendant could be said to have given fresh consideration for the transfer from Peed, he

could nevertheless in the circumstances acquire no better title than Peed. I have also, I think, shewn that, even if the suggested consideration could exist, the defendant would be estopped from setting it up against the plaintiffs. But I am further of opinion that, in the circumstances of this case, no such consideration in fact existed. There is no room for an implied consideration when one is proved in fact.

If some one steals my boots, and afterwards replaces them, one might perhaps — but not, I think, without some strain on the imagination — conceive that I impliedly release my right to complain of the theft, in return for the restored boots, though I did not know they had been stolen. But if I buy and pay for a pair of boots, and the bootmaker delays a fortnight before he sends them home, do I give two considerations for them — one when I pay for them, and a second when I receive them — or only one? It seems to me that in such case there is no need to search for an implied consideration. There is one in fact and only one, namely, the price. So here the only consideration given by the defendant was the sum which he paid in July, which entitled him as against Peed to a return of the notes.

It remains to consider the effect of s. 61. I agree with the argument of the learned counsel for the plaintiffs on this point. "In his own right" must mean something more than "not in a representative capacity," as executor for instance. It could not possibly mean that if a thief stole the note from the holder and placed it in the possession of the maker, at or after maturity, the note should ipso facto be satisfied; and yet this would be the result if the words "in his own right" are to bear the limited meaning suggested. I think "in his own right" must mean having a right not subject to that of any one else but his own — good against all the world.

On the whole, therefore, I think in this case there is no technical difficulty to prevent the application of the broad principle which I have named; that the defendant is "he who has enabled" Peed to occasion the loss; that he must, therefore, sustain it; and that the judgment of the Lord Chief Justice ought to be reversed.

As to estoppel being the foundation of rights arising upon unauthorized transfers of negotiable instruments, see Lord Mansfield in Russel *v.* Langstaffe, (1780) 2 Doug. 514, Tindal C.J. in Schultz *v.* Astley, (1836) 2 Bing. N. C. 544; and Ingham *v.* Primrose, (1859) 7 C. B. (N.S.) 82; 28 L. J. (C.P.) 294, impugned by Brett L.J. in Baxendale *v.* Bennett, 3 Q. B. D. 525, but decided in a considered judgment by a very strong Court, not questioned so far as I know elsewhere, and at all events sound in principle if wrong on the facts.

Appeal allowed.[1]

[1] In 15 T. L. R. 264 (1899), Russell, C.J., below, said: " . . . In March, 1897 . . . the notes, though dated considerably earlier, could not be said to be then overdue, because there was no evidence of there having been any prior demand, but it

DUNN *v.* MESERVE.

SUPREME COURT, NEW HAMPSHIRE. 1878.

58 N. H. 429.

ASSUMPSIT on a note, dated Oct. 31, 1872, and payable to the plaintiff or order, on demand. Facts agreed. Jan. 6, 1873, the plaintiff delivered the note to the City Bank, as collateral security for a note given by the plaintiff to the bank for money then loaned to him by the bank. The note of the defendant has not been endorsed: but in the note of the plaintiff was this stipulation: — "I hereby deposit with said bank, as collateral security, with authority to sell the same on the non-payment of this promise, or any other liability, and apply the proceeds to the payment thereof, note of" the defendant. Subsequently, the defendant, living in Dover, and supposing the plaintiff continued to hold his note, paid it by checks sent to the plaintiff, who lived in Manchester. This suit is brought by the bank, still holding the note, and being the plaintiff in interest.

DOE, C. J. The note not being endorsed, the suit was brought in the name of the payee. The plaintiff and the bank did not avail

would have been wiser, in view of the dates, for the plaintiffs to have made some inquiry. They did not do so, because they considered that they were dealing with a man whose credit and word could be relied on. . . .

"As between Peed and the plaintiffs the transactions by which Peed obtained possession of the promissory notes was voidable, but it had not been avoided. If the notes had remained for two or three days in the possession of Peed and the plaintiffs had become aware that Peed was no longer a man of credit, and if the plaintiffs could have satisfied a Court that there was strong reason to believe that a fraud was intended to be perpetrated on them, they could have got an injunction in the first instance to restrain Peed from parting with the bills, and later could, by a mandatory process, have demanded the return of the notes. They would then have been in a position, as lawful holders in due course, to have sued the defendant on them, because it was the fault of the defendant that he had not demanded the return of the bills. But that was not this case, because here, before the fraud was discovered, and before anything was done to avoid the transaction, the promissory notes came into the possession of the defendant, who, as between himself and Peed, had paid them. The plaintiffs' difficulty was that they were suing as holders of the bills when the action was brought, but they were not holders then. . . .

"It had been urged on behalf of the plaintiffs that the defendant had not by reason of the act or fraud of Peed, or the ostensible position which he was allowed [by the plaintiffs] to occupy as holder of these bills, done anything to alter his position to his own prejudice and that he was not at liberty to take advantage of the apparent title which Peed had acquired. That was an argument proper to be addressed to circumstances in which upon the faith of representations a party had or had not altered his position, but it had no bearing on the facts of this case, where it was not a question of representation but of an operative act of dealing with the notes."

themselves of the negotiability of the note; and the bank acquired no greater right than it would have had if the note had not been negotiable. Whatever may be the construction of the written stipulation, it had not more legal effect against the defendant than an assignment of a non-negotiable chose in action. And the bank shows no ground for an exception to the general rule, that a plaintiff in interest has no better case than the plaintiff of record. The defendant, having paid the payee in good faith, and without notice of the pledgee's claim, cannot be compelled to pay the note again.

Judgment for the defendant.[1]

UNION TRUST CO. *v.* McGINTY.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1912.

212 Mass. 205.

CONTRACT on a promissory note for $250 dated October 13, 1902, signed by the defendant as maker, payable two months after date to one James J. McCluskey, indorsed by McCluskey and discounted by the plaintiff at his request. Writ in the Municipal Court of the City of Boston dated October 6, 1908.

On appeal to the Superior Court the case was tried before Bell, J. There was evidence that the note was made by the defendant solely for McCluskey's accommodation, that at the maturity of the note on December 13, 1902, the plaintiff received from McCluskey a payment of $10 as interest to February 13, 1903, and that in consideration of this payment without the defendant's knowledge or consent the plaintiff extended the time of payment of the note until the last named date. It was agreed that the defendant had introduced evidence which would warrant the jury in finding that the plaintiff when the note was discounted knew through its president that the defendant had executed the note solely for McCluskey's accommodation and that McCluskey had not given the defendant any consideration therefor.

The judge ordered the jury to return a verdict for the plaintiff; and the defendant alleged exceptions.

RUGG, C. J. The single question presented in this case is whether the accommodation maker of a promissory note is discharged, if the holder, knowing that the note was made for the accommodation of the payee and indorser, by agreement with the indorser upon a valuable consideration, without the maker's consent, extends the time of payment.

Before the enactment of the negotiable instruments act one who

[1] Vann *v.* Marbury, 100 Ala. 438 (1893); Campbell *v.* Day, 16 Vt. 558 (1844), *accord*. *Contra*, Mulcahy *v.* Fenwick, 161 Mass. 164, 169 (1894), *semble*. Consider the effect of N. I. L. § 49.

made a promissory note for the accommodation of another was as between the parties a surety. The holder, who had knowledge of the true relation of the parties, was bound to act toward such accommodation maker as toward a surety in order to preserve his rights against him. Under such circumstances an extension of time to the person ultimately liable, without the consent of the surety, that is the accommodation maker, released the latter. Guild *v.* Butler, 127 Mass. 386, and cases cited at 389. Jennings *v.* Moore, 189 Mass. 197. The precise point is whether this rule of law has been changed by the negotiable instruments act.

It is a matter of common knowledge that the negotiable instruments act was drafted for the purpose of codifying the law upon the subject of negotiable instruments and making it uniform throughout the country through adoption by the legislatures of the several States and by the Congress of the United States. The design was to obliterate State lines as to the law governing instrumentalities so vital to the conduct of interstate commerce as promissory notes and bills of exchange, to remove the confusion or uncertainty which might arise from conflict of statutes or judicial decisions amongst the several States, and to make plain, certain and general the controlling rules of law. Diversity was to be moulded into uniformity. This act in substance has been adopted by many States. While it does not cover the whole field of negotiable instrument law, it is decisive as to all matters comprehended within its terms. It ought to be interpreted in such a way as to give effect to the beneficent design of the Legislature in passing an act for the promotion of harmony upon an important branch of the law. Simplicity and clearness are ends especially to be sought. The language of the act is to be construed with reference to the object to be attained. Its words are to be given their natural and common meaning, and the prevailing principles of statutory interpretation are to be employed. Care should be taken to adhere as closely as possible to the obvious meaning of the act, without resort to that which had theretofore been the law of this Commonwealth, unless necessary to dissolve obscurity or doubt, especially in instances where there was a difference in the law in the different States.

Approaching the act from this point of view, it is apparent that no relation of principal and surety is established or contemplated by any of its sections. It determines the liability of the various parties to the negotiable instrument on the basis of that which is written on the paper. The obligation of all makers, whether for accommodation or otherwise, is to pay to the holder for value according to the terms of the bill or note. Their obligation is primary and absolute. [§§ 60, 192.] The act makes no provision for the proof of another and different relation than that expressly undertaken and defined by the tenor of the instrument signed. The fact that one is an accommodation maker gives rise to a duty no

less or greater or different to the holder for value than that imposed upon a maker who received value. This is expressly provided by the act, even though such holder knew at the time of making that the maker was an accommodation maker. [§ 29.] The act further provides in definite terms that the instrument and hence one primarily liable is discharged in one of five different ways [§ 119], that is, by payment by the principal debtor, or by the party accommodated, by cancellation, by any other act which would discharge a simple contract, and by the principal debtor becoming the owner at or after maturity. There is no mention here of a discharge of an accommodation party by extension of time. But among the ways in which a party secondarily liable may be discharged is [§ 120] an agreement by the holder to extend the time of payment or to postpone his right to enforce the instrument "unless made with the assent of the party secondarily liable or unless the right of recourse against such party is expressly reserved." Whatever force might attach to the enumeration of ways in which the instrument and consequently parties primarily liable might be discharged, if this provision stood alone, the inference arising from the omission of extension of time from such enumeration and its inclusion among the ways in which persons secondarily liable may be discharged, is almost irresistible that the Legislature did not intend that persons primarily liable should be discharged in that manner. These two sections standing side by side, both dealing with the subject of discharge of liabilities of parties, the one mentioning, the other not mentioning, extension of time by the holder as a means of working discharge of liability, cannot be treated as accidental or without significance. It is strong proof of a legislative purpose to change the pre-existing law of the Commonwealth. These considerations outweigh the argument adduced from the fact that the "instrument" rather than "parties primarily liable" is the language used in [§ 119] and from the phrase of cl. 4, to the effect that the instrument may be discharged "by any other act which will discharge a simple contract." The act establishes a liability on the part of an accommodation maker, which is not affected by an extension of time given by the holder to any other party to the note, even though as between such party and the accommodation maker a different relation may subsist in fact from that appearing on the face of the paper. The result is to render somewhat more rigid the rights of the parties as set forth in the written instrument, and so far as the holder is concerned to establish liability to him upon a firm basis, not easily shaken by parol evidence.

There is nothing inconsistent with this conclusion in Enterprise Brewing Co. *v.* Canning, 210 Mass. 285. The contention of the defendants there discussed concerned a relation of principal and surety between the payee and guarantor in an action between the two.

This appears to be the view taken without exception by the courts of other jurisdictions which have considered the point. In the interpretation of a statute widely adopted by the States to the end of securing uniformity in a department of commercial law, we should be inclined to give great weight to harmonious decisions of courts of other States, even if we were less clear than we are in this instance as to the soundness of our own conclusion. Vanderford *v.* Farmers' Bank, 105 Md. 164. Cellars *v.* Meacham, 49 Ore. 186. Wolstenholme *v.* Smith, 34 Utah, 300. Bradley Engineering & Manuf. Co. *v.* Heyburn, 56 Wash. 628. National Citizens' Bank *v.* Toplitz, 81 App. Div. (N. Y.) 593. Affirmed on another ground 178 N. Y. 464. Richards *v.* Market Exchange Bank, 81 Ohio St. 348. Fritts *v.* Kirchdorfer, 136 Ky. 643, 650.

Exceptions overruled.[1]

[1] See Some Necessary Amendments of the Negotiable Instruments Law, J. D. Brannan, 26 Harv. L. Rev. 594–596 (1913); Suretyship at "Law Merchant," Anan Raymond, 30 Harv. L. Rev. 141 (1916); The Uniform Negotiable Instruments Law. Is it producing Uniformity and Certainty in the Law Merchant? Crawford D. Hening, 59 U. of Pa. L. Rev. 532 (1911).

NEGOTIABLE BONDS

EDELSTEIN *v.* SCHULER & CO.

COMMERCIAL COURT, KING'S BENCH DIVISION. 1902.

[1902] 2 K. B. 144.

THE plaintiff claimed damages for the conversion of the bonds of various companies.[1] The bonds of the Bechuanaland Railway Company, an English company, were issued in England, payable "to the bearer or when registered to the registered holder" and contained this clause:

"3. This debenture is issued subject to and with the benefit of the conditions indorsed hereon which are to be deemed part of it."

Besides conditions providing that the debenture was not transferable by delivery during registration, the following indorsed conditions were material:

"6. Whenever this debenture is unregistered it is to be regarded as negotiable, and all persons are invited by the company and the owner for the time being to act accordingly. . . .

"12. The principal moneys hereby secured shall immediately become payable: —

"(*a*) If the company makes default for a period of six calendar months in the payment of any interest hereby secured, and the bearer hereof before such interest is paid, by notice in writing to the company calls in such principal moneys; or

"(*b*) If an order is made or an effective resolution is passed for the winding-up of the company; or

"(*c*) At the expiration of six calendar months from the time when this debenture is drawn for redemption pursuant to clause 25 of the indenture below mentioned, and the notice in that clause mentioned is given." . . .

The bonds of the Union Pacific Railroad Company ran to the holder or the registered holder, with provisions for registration; on default in payment of the interest the principal became due.

The facts as stated by the learned judge in his judgment were as follows: "It appeared at the trial that the plaintiff, to whom these bonds belonged, kept them in a safe in his office. They were stolen from the safe by one of the plaintiff's clerks. This clerk then from time to time employed a broker named Megson, who traded on the Stock Exchange at Bradford, to sell the bonds. Megson in the ordinary way of business sold them through the defend-

[1] The statement of facts is condensed, the terms of other stolen bonds being omitted.

ants, who are stockbrokers carrying on their business on the London Stock Exchange. The bonds were sold to jobbers either for cash or for the account, and when sold they were sent to the defendants so that they might hand them to the jobbers in exchange for the price. When the defendants received the money, they remitted the amount to Megson, either in cash or in account current, and he in his turn paid the money to the clerk. It was admitted that the defendants had no notice of any infirmity in the vendor's title, and that they acted throughout with perfect bona fides. On discovering the theft the plaintiff brought this action."

Evidence was given on behalf of the defendants that the bonds in question and all others of a similar nature are treated by the Stock Exchange and by the mercantile world generally as negotiable instruments passing by delivery from hand to hand.

BIGHAM, J. . . . A body of evidence was called at the trial to shew that all these bonds pass from hand to hand among the people who deal in them, and that they are treated as negotiable in the same way as the bonds of foreign Governments. No serious attempt was made to refute this evidence, and it quite satisfied me that all the bonds in question belong to a class which bankers, stockbrokers, and others whose business it is to deal in such securities treat, rightly or wrongly, as negotiable and as passing from hand to hand by mere delivery. It is in these circumstances that the plaintiff seeks to fix the defendants with liability. He says that, though such bonds may in fact be treated commercially as negotiable, they are not in law negotiable; and he further says that even if lawfully negotiable, yet, as the defendants were never holders of them for value, they are liable in trover, having handled them with the intention of vesting the property and possession in the jobbers who bought them.

In support of the first of these two contentions Mr. Danckwerts argued that the attribute of negotiability could not be attached to a contract except by the law merchant; and that these bonds are of such recent creation that their negotiability under that branch of the law cannot be justified. It is no doubt true that negotiability can only be attached to a contract by the law merchant or by a statute; and it is also true that, in determining whether a usage has become so well established as to be binding on the Courts of law, the length of time during which the usage has existed is an important circumstance to take into consideration; but it is to be remembered that in these days usage is established much more quickly than it was in days gone by; more depends on the number of the transactions which help to create it than on the time over which the transactions are spread; and it is probably no exaggeration to say that nowadays there are more business transactions in an hour than there were in a week a century ago. Therefore the comparatively recent origin of this class of securities in my view creates no difficulty in the way of holding that they are negotiable by virtue of the law merchant;

they are dealt in as negotiable instruments in every minute of a working day, and to the extent of many thousands of pounds. It is also to be remembered that the law merchant is not fixed and stereotyped; it has not yet been arrested in its growth by being moulded into a code; it is, to use the words of Cockburn C. J. in Goodwin *v.* Robarts, L. R. 10 Ex. at p. 346, capable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce, the effect of which is that it approves and adopts from time to time those usages of merchants which are found necessary for the convenience of trade; our common law, of which the law merchant is but a branch, has in the hands of the judges the same facility for adapting itself to the changing needs of the general public; principles do not alter, but old rules of applying them change, and new rules spring into existence. Thus it has been found convenient to treat securities like those in question in this action as negotiable, and the Courts of law, recognising the wisdom of the usage, have incorporated it in what is called the law merchant, and have made it part of the common law of the country. In my opinion the time has passed when the negotiability of bearer bonds, whether Government bonds or trading bonds, foreign or English, can be called in question in our Courts. The existence of the usage has been so often proved and its convenience is so obvious that it must be taken now to be part of the law; the very expression "bearer bond" connotes the idea of negotiability, so that the moment such bonds are issued to the public they rank themselves among the class of negotiable securities. It would be a great misfortune if it were otherwise, for it is well known that such bonds are treated in all foreign markets as deliverable from hand to hand; the attribute not only enhances their value by making them easy of transfer, but it qualifies them to serve as a kind of international currency; and it would be very odd and a great injury to our trade if these advantages were not accorded to them in this country. But I am not to be guided alone by evidence and by questions of expediency. The point is entirely covered by authority. The arguments in support of the contention that these bonds are not negotiable were all adduced before, and carefully examined by, Kennedy J. in the case of Bechuanaland Exploration Co. *v.* London Trading Bank, [1898] 2 Q. B. 658, and were dismissed by him as unsound. I have read the judgment in that case, and desire to say that I entirely agree with the conclusions and with the reasons which lead up to them. I go, perhaps, further than Kennedy J. intended to go, for I think that it is no longer necessary to tender evidence in support of the fact that such bonds are negotiable, and that the Courts of law ought to take judicial notice of it. . . .

Judgment for defendants.

CROCKER NATIONAL BANK *v.* BYRNE.

SUPREME COURT, CALIFORNIA. 1918.

173 Pac. 752.

THE plaintiff bank[1] sues to recover the value of bonds of the Spring Valley Water Company and the Market Street Railway, which its assistant cashier, Baker, who had access to the vaults for limited purposes, took and hypothecated to the defendant stock-brokers as margin on a personal account with them. The bonds and coupons are payable to bearer. Each bond states that it is secured by a mortgage on specified property, and that it "is issued subject to all the provisions contained in said mortgage"; that upon default of interest or taxes or any promise in the mortgage, if such default continues for the time specified in the mortgage, the principal of the bond shall at the option of the trustee or the holders of a majority of the outstanding bonds become immediately due and payable; and that the trustee or bondholder shall look for payment solely to the corporate assets, which shall not embrace any liability of directors or stockholders. The mortgage gives similar optional rights to declare the principal due after default, and permits the holders of 80% of the outstanding bonds the option to waive any default.

The Superior Court gave judgment for the defendants,[2] refusing

[1] The statement of facts is compiled by the editor.

[2] Reported in 6 Cal. L. Rev. 444, 449 (1918). The oral opinion of Seawell, J., was in part:

Now, the circumstance which, under the Kohn case, permits the maker of a bond to set up a defense against the holder is one which adds to its market value and enables the maker of the bonds to put them upon the market.

There are two features which affect the actual negotiability of a bond. One is, that it is secured by mortgage, and the other is the acceleration of the maturity of the bond by a provision that if the interest is not punctually paid, then the principal becomes due at the election of the holder. If the bonds are not secured, I apprehend they would have very little circulation, and particularly among bankers. In case the coupons are not paid as they fall due and the only remedy of the holder is to bring suits for the interest as the coupons fell due and he had to wait for years for the principal, I apprehend that there would be considerable difficulty in negotiating such securities.

Now, these securities are of a peculiar nature. They stand in a class by themselves. They may be called negotiable, or by any other name you may deem appropriate, but they are, in fact, more current than any other form of negotiable paper, much more so than an ordinary promissory note would be. Banks and bankers are particularly interested in the establishing of a rule which will protect the purchaser of such securities where he pays a valuable consideration and receives them in good faith without notice of any defect of title on the part of the seller. They are expressly designed to pass from hand to hand, and by actual usage are so transferred. There are large numbers of these bonds in controversy, 28,000 of the Spring Valley Water Company bonds of one thousand dollars each,

to follow Kohn *v.* Sacramento etc. Co., 168 Cal. 1 (1914), which declared similar bonds non-negotiable because conditional and payable out of a specific fund, and held them to be subject to the maker's equitable defenses though in the hands of a bona fide transferee. The plaintiff appeals.

The material sections of the California Civil Code (1909) are given in the footnotes.[1]

SHAW, J. . . . The transactions between Baker and the defendants occurred before the enactments of the amendments of 1915 changing the above sections so as to meet the decision in the Kohn Case. The doctrines laid down in the Kohn Case are therefore applicable to the present case. We see no reason for changing them. . . .

The respondent admits the rule to be that the seller of ordinary property can transfer no better title than he has himself, and that one who buys such property from a finder or from a thief obtains no title against the true owner. They seek to avoid the effect of the rule in this case under the claim that in this state bonds payable to bearer, but not negotiable instruments according to the definition of the Civil Code, pass by delivery alone, and that by the general usage and custom of trade they have come to be generally considered as negotiable instruments, and have acquired that character notwithstanding the fact that they violate the terms of section 3088, declaring that a negotiable instrument must be made payable in money only, without any conditions not certain of fulfillment. They further claim that even if such bonds are not negotiable instruments as against the obligor therein, they are such with respect to successive holders as to all matters which do not concern the obligor,

payable in twenty years. The Market Street Railway bonds are payable in thirty years.

I do not think we ought to stop to consider the rules applicable to bills of exchange and promissory notes when we come to transactions of this kind. These bonds are designed to be put upon the market, and to be the subject of investment by moneyed men. It is not important to call them negotiable instruments. Custom has fixed their character, regardless of any other test.

[1] § 3088. A negotiable instrument must be made payable in money only and without any condition not certain of fulfilment, except that it may provide for the payment of attorney's fees and costs of suit, in case suit be brought thereon to compel the payment thereof. § 3092. A negotiable instrument may contain a pledge of collateral security with authority to dispose thereof. § 3093. A negotiable instrument must not contain any other contract than such as is specified in this article. § 3095. There are six classes of negotiable instruments, namely: 1. Bills of exchange; 2. Promissory notes; 3. Bank notes; 4. Checks; 5. Bonds; 6. Certificates of deposit.

Cal. Stat. (1915) c. 78 amended § 3088 by adding: "*provided, however*, that bonds payable to bearer shall be negotiable, notwithstanding any condition contained therein or in the mortgage, deed of trust or other instrument securing the same.

This amended section and the other sections quoted are repealed by Cal. Stat. (1917) c. 751 § 1, which adopts the N. I. L.

and therefore are to be treated as negotiable instruments in any controversy between the plaintiff and the defendants concerning them. Evidence of the usage mentioned was introduced, the court below found that such usage existed, and held with the defendants on both propositions.

The two cases [1] last mentioned hold to the contrary of the first of these propositions, and they are decisive on that subject. The English cases cited by respondents in support of the proposition that bonds similar to those here in dispute may, by usage, acquire the character of negotiable instruments, place the decision on the ground that in England negotiable instruments are not defined or declared to be such by statute, but became invested with their peculiar characteristics originally by the general custom of merchants, and that there was in that country no reason why such general custom could not also invest other instruments which pass by delivery with the same qualities and put them in the same class, and they declare that if there was a statute governing the subject, such custom could not enlarge the class created by the statute.[2] In the Kohn Case we said that custom "never overcomes the positive provisions of statutes," and the statement cannot be disputed.

The Civil Code is a positive statute, and nothing can be established by custom contrary to its terms. The existence of such custom is therefore of no effect. The court below erred in admitting evidence thereof.

No authority is cited for the second proposition, and we think it is likewise in contravention of the Code. It is really nothing more than a claim that notes or bonds of a form which the Code declares cannot be deemed negotiable instruments may nevertheless become such under some circumstances. The rule that custom cannot overcome the positive provisions of a statute, or make that a negotiable instrument which the Code declares shall not be such, is equally forceful to prevent the courts from creating exceptions not made by the Code, and which are contrary to its express terms. The language of the Code defining such instruments permits of no exceptions in favor of a note or bond nonnegotiable in form, whereby they may become negotiable instruments after the first holder has sold them, or as against all persons other than the obligor. The courts cannot legislate, especially where the legislation proposed would, in effect, repeal or modify a statute.

We cannot assent to the claim that the rule by which negotiable instruments may be sold by a finder or a thief before maturity, so as to pass a good title to the buyer, should be, or has been, extended so as to include bonds or notes which, though not negotiable in form, are made payable to bearer, and to which title may be passed by

[1] Kohn Case, *supra;* Chase *v.* Whitmore, 68 Cal. 547.

[2] Citing Edelstein *v.* Schuler, *supra*, 93, and cases cited therein; Rumball *v.* Metropolitan, 2 Q. B. D. 194.

sale and delivery. This is directly contrary to the decision in Chase *v.* Whitmore, supra. . . .

It may be that some of the reasons which led to the exception of negotiable instruments from the general rule that a seller can give no better title than he has himself would apply with equal force to instruments payable to bearer, but not negotiable in form. But this is not sufficient excuse or reason for including such instruments within the exception. The exception has been established from time immemorial, and it has hitherto been confined to negotiable instruments, money, and currency. It is to be presumed that this is generally understood; that the owners of such property guard the same with greater care for that reason, a care which the owners of other property need not exercise. It would be unjust and inadvisable as a matter of policy to extend the exception by a judicial decision. And besides, it would be judicial legislation, a thing forbidden to the courts. Moreover, in this state, the same cause would logically extend the exception to all personal property. The Code makes the title to all such property transferable by oral sale and delivery of possession, and where it so passes, the Code allows the buyer to sue in his own name to recover it, if a chattel, or to enforce it if it consists of a promise to pay money. We apprehend that even the respondents' counsel would shrink from these logical consequences of this part of their argument.

It is further argued that every note or bond payable to bearer is negotiable by mere delivery, and is therefore a negotiable instrument, regardless of its form. The argument on this head is supported mainly by extracts from opinions of the courts of other jurisdictions in which the word "negotiable" is used in a sense different from that which it has in the phrase "negotiable instrument." Any contract to pay money the title to which may be passed by delivery alone, or by indorsement, is "negotiable," in the sense in which the word is often used. When the title has so passed, it is often said that the instrument has been "negotiated." But the fact that title may be so passed does not make it a negotiable instrument, within the meaning of the Civil Code, nor within the meaning of that term as used in the decisions which except negotiable instruments from the general rule regarding sales by a finder or a thief. This statement is well illustrated by reference to the case of an ordinary negotiable instrument made payable to bearer, or indorsed in blank by the payee and which has become past due. It is then negotiable, in the meaning above referred to, by mere delivery, the same as it was before maturity, but it is no longer a negotiable instrument, nor within the exception as to sales by a finder or thief. . . .

The judgment is reversed.[1]

[1] See note on the Negotiability of Bonds in California and the Negotiable Instruments Law, A. M. Kidd, 6 Cal. L. Rev. 444 (1918); Ewart on Estoppel, chapter XXIV; 2 Machen on Corporations, § 1740 A, who refers to N. I. L. § 65

as showing that the Act applies to coupon bonds. Machen presents a concrete case of dubious negotiablility under the Act:

"The year after the passage of [the N. I. L., 1898] by the State of Maryland, the corporation operating the street railways of the City of Baltimore issued a large number of income bonds which are to be redeemable at the option of the company after a certain date, but which by their terms are never to mature except upon default by the company in paying principal or interest of certain underlying mortgage bonds. The interest on the income bonds is represented by coupons, which, however, are payable only in the event that sufficient income is earned by the company. . . . [The bonds] are constantly dealt in on the stock exchange, and are treated by brokers and others as negotiable instruments."

Coupon bonds excluding stockholders' and directors' liability: These were held not negotiable in Kohn *v.* Sacramento etc. Co., 168 Cal. 1, 7 (1914). *Accord,* Heflin *v.* Hilton, 124 Ala. 365 (1899) — promissory note. *Contra,* Hibbs *v.* Brown, 190 N. Y. 167 (1907, N. I. L.) — coupon bonds of unincorporated joint-stock company. Grady *v.* Graham, 64 Wash. 436 (1911), discusses the validity of the exemption clause; so also the cases in Cal. and N. Y. A bond payable only out of the mortgaged property with no recourse to the general corporate assets would not be negotiable under Allison *v.* Hollembeak, 138 Ia. 479 (1908, N. I. L.); Street *v.* Robertson, 28 Tex. Civ. A. 222 (1902) — both note cases.

APPENDIX

FORMS

PROMISSORY NOTE:

$..... .....*19*.....

.....*after date*.....*promise to pay to*

the order of.....PAYEE.....

..... *Dollars*

Payable at.....

Value received

Number.....*Due*..... MAKER.....

BILL OF EXCHANGE:

$..... ....*19*.....

Pay to the

Order of.....PAYEE.....

..... *Dollars*

Value received and charge to account of
With current rate of exchange

To.....DRAWEE.....
Number..... } .....DRAWER.....

INSTRUMENT WITH ACCELERATION PROVISIONS:

$..... Providence, R. I.....19.....

.....after date,

for value received.....promise to pay to the.....
NATIONAL BANK, or order, at its office in the City of Providence
..... Dollars,
having deposited with said Bank as collateral security for the payment of this note, and to be held as security for the payment of this or any other liability of the undersigned to said Bank, due or to be-

come due, now contracted or hereafter contracted, the following property, viz.:

.....

.....

.....

with full power to said Bank or its assigns, or the President or Cashier for the time being, of said Bank, to sell and deliver the whole or any part thereof, or any substitutes therefor or additions thereto, at any Brokers' Board, or at public or private sale, in said Providence or elsewhere, at option, on non-performance of this promise, or non-payment of any liabilities hereby secured, at any time hereafter, with or without advertisement, notice or demand, which are hereby expressly waived, and upon such sale the pledgee or its assigns may bid and purchase, discharged from any right of redemption. It is also agreed that said collaterals may from time to time be exchanged by mutual consent for others, which shall be held on the terms and with the powers hereof. The present value of said securities, it is agreed, is

..... Dollars,

and if, in the opinion of said Bank or its Cashier, or the assigns of said Bank, there should be any depreciation in market or other value of the collateral held for the time being prior to maturity of any of the liabilities hereby secured, the undersigned, on demand, shall furnish additional security to the satisfaction of the Bank or its assigns, and in case of failure for one day after demand so to do, said securities or any part thereof may be sold with all the powers and waivers above provided, and from sums received under the powers of this instrument or any of them, to first satisfy all attorneys' fees and other expenses of every kind, and the residue to apply so far as sufficient and in the manner which said Bank or its assigns may prefer, to the payment of any, either or all the liabilities hereby secured, whether then due or thereafter to become due, making rebate of interest upon demands not due, returning any surplus to the undersigned. And in case of any deficiency the undersigned agrees to pay to said Bank or its assigns the amount thereof forthwith after such sale, with interest, but nothing herein contained shall obligate the said Bank or its assigns to resort to the collateral before proceeding against the undersigned or his estate for non-payment of sums due, or prevent it or them from prosecuting both remedies at the same time, to the end that all liabilities hereby secured may be paid in full.

.....

The question whether this instrument satisfies the formal requisites of a note must be determined in the light of Holliday State Bank *v.* Hoffman, *supra* 2, and similar cases.

TRAVELER'S CHECK:

THE UNIVERSAL EXPRESS COMPANY

.....191.....

TRAVELER'S CHECK

When countersigned
below with this signature
John Barnard Byles

The UNIVERSAL EXPRESS COMPANY at its Paying Agencies
Will pay to the order of.....

In United States and Canada, $50; Great Britain and Ireland, £10–4–1; France, 260.76 francs; other countries at current rates.

Countersigned: (See signature above)

.....

THE UNIVERSAL EXPRESS CO.
Hibbs Brown, Treas.

On the nature of this instrument and the effect of the various signatures, see Sullivan *v.* Knauth, 220 N. Y. 216 (1917); below, 81 N. Y. Misc. 148 (1913), 161 N. Y. App. Div. 148 (1914); L. R. A. 1917 F, 554.

LIST OF CASES FOR STUDY

(Cases are in Volume I of Ames' Cases on Bills and Notes unless otherwise specified. II refers to Volume II of Ames, and C to this pamphlet. Portions of the Negotiable Instruments Law to be read with the cases are indicated by section-number. B.E.A. refers to the English Bills of Exchange Act, 1882.)

1. Ruff *v.* Webb.
2. Little *v.* Slackford.
3. Norris *v.* Solomon.
6. Fisher *v.* Leslie.
7. Block *v.* Bell.
8. Brooks *v.* Elkins.
13. Forward *v.* Thompson. (§ 130.)
15. Smith *v.* Allen.
17. Russell *v.* Whipple.
20. Bank *v.* Merrill.
21. Currier *v.* Lockwood. (§ 184).
24. Smith *v.* Boheme.
25. Josselyn *v.* Lacier.
30. Macleed *v.* Snee. (§ 3).
31. Kingston *v.* Long.
31. Hartley *v.* Wilkinson.
34. Jarvis *v.* Wilkins.
35. Shenton *v.* James.
36. Richardson *v.* Martyr.
37. Jury *v.* Barker.
39. Morris *v.* Lee.
39. Rex *v.* Wilcox.
40. Horne *v.* Redfearn.
42. Ellison *v.* Collingridge.
45. St. Stephen *v.* Black.
50. Chrysler *v.* Renois. (§ 6–5).
53. Martin *v.* Chauntry.
53. Wise *v.* Charlton.

C 1. Sloan *v.* McCarty. (§ 3–2).
Rest of Chap. I. Sect. V. (§ 5).
Chap. I. Sect. VI. (§§ 2, 4).
C 2. Holliday *v.* Hoffman.
101. M'Call *v.* Taylor.
881. Harvey *v.* Cane.
Rest of Chap. I. Sect. VII. (§§ 8, 184).
134. Chapman *v.* Cottrell.
Chap. I. Sect. IX. (§§ 87, 126, 130.)
146. Anonymous.
146. Petit *v.* Benson. (§§ 139 to 142).
151. Jackson *v.* Pigott. (§§ 7, 138).
156. Langston *v.* Corney.
157. Jeune *v.* Ward. (§ 137).
163. Dufaur *v.* Oxenden.
164. Leslie *v.* Hastings.
165. Spear *v.* Pratt. (§ 132).
187. Coolidge *v.* Payson. (§§ 133 to 136).
Chap. II. Sect. III. (§§ 161, 170).
Chap. II. Sect. IV.
N. I. L. §§ 16, 132, 191 — "Acceptance."
Chap. III. Sect. I. (§§ 32 to 35).
C 6. Anonymous.
Chap. III. Sect. II. (§ 31).
231. Bishop *v.* Hayward.
233. Penny *v.* Innes.
239. Wilders *v.* Stevens.
B. E. A. § 56; N. I. L. §§ 17–6, 63, 64.
C 6. Haddock *v.* Haddock.
273. Brind *v.* Hampshire.
276. Adams *v.* Jones.
450. Collins *v.* Martin.
279. Marston *v.* Allen.
506. Hayes *v.* Caulfield. (§ 16).
C 10. Harvey *v.* Towers.
C 13. Leavitt *v.* Thurston. (§ 59).
Rest of Chap. III. Sect. IV.
Chap. IV. Sect. I.
B. E. A. § 8–4; N. I. L. § 1–4.
314. Death *v.* Serwonters.
886. Mertens *v.* Winnington.
887. *Ex p.* Lambert. (§ 175).
315. Smith *v.* Clarke. (§§ 9–5, 40).
Rest of Chap. IV. Sect. II. (a).
331. Smith *v.* Pickering.
331. Prevôt *v.* Abbot.
332. Watkins *v.* Maule.
337. Harrop *v.* Fisher.

339. Edge *v.* Bumford.
C 16. Hood *v.* Stewart. (§§ 28, 49).
Rest of Chap. IV. Sect. II. (b).
C 18. Chappelear *v.* Martin.
C 20. Parsons *v.* Utica. (§ 59).
386. Stone *v.* Rawlinson.
389. Carvick *v.* Vickery.
392. Wallace *v.* Hardacre.
396. Estabrook *v.* Smith. (§ 41.)
398. Anonymous.
400. Miller *v.* Race.
410. Peacock *v.* Rhodes.
418. Smith *v.* Chester.
429. Mead *v.* Young.
458. Barlow *v.* Bishop.
513. Smith *v.* Marsack. (§§ 60–62.)
II 994. M'Neilage *v.* Holloway.
477. Drayton *v.* Dale.
509. Braithwaite *v.* Gardner.
399. Bowyer *v.* Bampton.
413. Lowe *v.* Waller.
C 25. Eskridge *v.* Thomas. (§§ 55, 57.)
455. Parr *v.* Eliason.
473. Lowes *v.* Mazzaredo.
464. Potter *v.* Tubb.
512. Bennison *v.* Jewison.
591. Towne *v.* Rice.
II 202. Cram *v.* Hendricks. (§ 57)
II 678. Kent *v.* Walton.
569. Moore *v.* Baird.
573. Whitten *v.* Hayden
460. Duncan *v.* Scott.
C 28. Fairbanks *v.* Snow.
N. I. L. §§ 55, 52.
463. Williamson *v.* Watts.
417. Grey *v.* Cooper.
C 31. Murray *v.* Thompson. (§ 22.)
517. Hallifax *v.* Lyle.
492. Sentence *v.* Poole.
561. Peaslee *v.* Robbins.
558. Wilson *v.* Nisbet.
604. Sweet *v.* Chapman.
468. Dunn *v.* O'Keefe.
II 142. Whitehead *v.* Walker. (§§ 116, 117, 52–2.)
407. Price *v.* Neal. (§§ 62, 65, 66.)
534. Thiedemann *v.* Goldschmidt.
C 33. Guaranty *v.* Hannay.
495. Langton *v.* Lazarus.
587. Marine Bank *v.* City Bank.
601. La. Bank *v.* Citizens Bank.
419. Minet *v.* Gibson.
453. Hunter *v.* Jeffery.
461. Bennett *v.* Farnell.
B. E. A. § 7–3; N. I. L. § 9–3.
C 40. Jordan *v.* National.
C 45. Phillips *v.* Mercantile.
C 48. Tolman *v.* American. (§ 23.)
562. Hortsman *v.* Henshaw.
574. Mechanics *v.* Straiton. (§ 9–4.)
434. Master *v.* Miller. (§§ 124, 125.)
482. Hall *v.* Fuller.
576. Wait *v.* Pomeroy.
584. McGrath *v.* Clark.
607. Citizens *v.* Richmond.
II 596. Alderson *v.* Langdale.
II 598. Atkinson *v.* Hawdon.
522. Montague *v.* Perkins.
527. Barker *v.* Sterne.
715. Awde *v.* Dixon. (§ 21.)
718. Hatch *v.* Searles.
733. Mitchell *v.* Culver. (§§ 14, 52.)
548. Hogarth *v.* Latham.
579. Clarke *v.* Johnson.
N. I. L. §§ 16, 52, 30, 191 — "Holder."
C 51. Empire *v.* Manhattan.
530. Ingham *v.* Primrose.
N. I. L. § 119–3; B. E. A. § 63–1.
553. Baxendale *v.* Bennett. (§ 15.)
580. Caulkins *v.* Whisler.
486. Young *v.* Grote.
C 57. Scholfield *v.* Londesborough. (§ 124.)
540. Foster *v.* Mackinnon. (§§ 55, 57.)
598. Brown *v.* Reed.
582. Harvey *v.* Smith.
C 62. Robb *v.* Pennsylvania.
II 635. Popplewell *v.* Wilson.
II 635. Smith *v.* Knox.
II 642. Ridout *v.* Bristow.
650. Note.
667. Note. (§ 25.)
670. Holcomb *v.* Wyckoff.
674. Lay *v.* Wissman. (§§ 57, 27.)
676. Dresser *v.* Missouri. (§§ 54, 25.)
C 67. Merchants *v.* Santa Maria.
682. Edie *v.* East India Co. (§ 36.)
691. Chalmers *v.* Lanion. (§§ 58, 121.)
692. Robertson *v.* Kensington. (§ 39.)

704. Lloyd *v.* Sigourney. (§§ 36, 37.)
C 70. Smith *v.* Bayer.
709. Goodman *v.* Harvey. (§ 56.)
734. Epler *v.* Funk. (§ 38.)
735. Kieffer *v.* Ehler.
738. Fielden *v.* Lahens.
742. Bank *v.* Hammett.
888. Miller *v.* Crayton.
890. Huston *v.* Young.
745. Brown *v.* Davies.
891. In re European Bank.
C 73. Gardner *v.* Beacon Trust.
B. E. A. § 36; N. I. L. §§ 52, 55, 57, 58, 16.
755. Burrough *v.* Moss.
766. Oulds *v.* Harrison.
773. Ashurst *v.* Bank.
775. Holmes *v.* Kidd.
748. Charles *v.* Marsden.
760. Stein *v.* Yglesias.
763. Sturtevant *v.* Ford.
793. Chester *v.* Dorr.
N. I. L. §§ 52, 28, 58, 29.
782. Losee *v.* Dunkin.
N. I. L. §§ 70, 53, 193.
C 77. Columbian *v.* Bowen (§ 71.)
791. Ames *v.* Meriam.
N. I. L. §§ 89, 185, 186, 120–3.
784. Leavitt *v.* Putnam. (§ 7.)
799. Bank *v.* Bank. (§§ 70, 53, 71.)
787. Pine *v.* Smith. (§ 52–2.)
788. Vinton *v.* King.
802. Anonymous. (§§ 119–1, 88.)
497. Morley *v.* Culverwell.
803. Serra *v.* Berkley.
803. Johnson *v.* Kennion.
804. Smith *v.* Sheppard.
806. Beck *v.* Robley.
809. Callow *v.* Lawrence. (§§ 121, 119–2.)
C 80. Lill *v.* Gleason (§ 121.)
807. De Silva *v.* Fuller.
811. Freakley *v.* Fox (§ 119–5.)
820. Harmer *v.* Steele.
814. Bartrum *v.* Caddy.
C 83. Nash *v.* De Freville. (§ 119–1, 5.)
818. Lazarus *v.* Cowie. (§119–2.)
824. Jones *v.* Broadhurst.
832. Williams *v.* Jamès.
855. Agra Bank *v.* Leighton.
861. Thornton *v.* Maynard.
855. Milnes *v.* Dawson.
837. Foster *v.* Dawber. (§ 122.)
842. Attenborough *v.* Mackenzie.
857. Woodward *v.* Pell.
866. Wheeler *v.* Guild.
C 88. Dunn *v.* Meserve. (§ 49.)
873. Pray *v.* Maine.
878. In re Souther.
N. I. L. §§ 119, 120, 192, 196.
C 89. Union Trust Co. *v.* McGinty.

(*The remaining cases are all in Volume II of Ames.*)

100. Duckmanee *v.* Keckwith.
240. Blethen *v.* Lovering.
169. MacGregor *v.* Rhodes. (§§ 65, 66.)
109. Blesard *v.* Hirst.
231. Bank *v.* Caverly.
550. Siffkin *v.* Walker. (§ 20.)
708. Dean *v.* Carruth.
712. O'Donnell *v.* Smith.
733. Hopkinson *v.* Forster. (§ 189.)
744. First National *v.* Leach. (§ 188.)
212. Colt *v.* Barnard.
234. Tuttle *v.* Standish.
114. Gale *v.* Walsh.
N. I. L. §§ 118, 129, 152–156.
133. Philpott *v.* Bryant. (§ 143.)
N. I. L. §§ 70–87.
115. Cromwell *v.* Hynson.
N. I. L. §§ 89–117.
104. Heylyn *v.* Adamson.
102. Bank *v.* Newman.
58. Thompson *v.* Clubley. (§ 29.)
156. Castrique *v.* Butigieg.
182. Denton *v.* Peters.
243. Ross *v.* Espy. (§ 68.)
124. Hoare *v.* Graham.
132. Free *v.* Hawkins.
135. Pike *v.* Street.
558. Grist *v.* Backhouse. (§ 42.)
706. Sheldon *v.* Parker.
753. Goodwin *v.* Robarts.
C 93. Edelstein *v.* Schuler.
C 96. Crocker *v.* Byrne. (§ 1.)